CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1946

No. 88

HELENE A. JESIONOWSKI, ADMINISTRATRIX,
PETITIONER,

vs.

BOSTON & MAINE RAILROAD

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 17, 1946.

CERTIORARI GRANTED MAY 20, 1946.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

OCTOBER TERM, 1944.

No. 4108.

BOSTON & MAINE RAILROAD,

DEFENDANT, APPELLANT,

v.

HELENE A. JESIONOWSKI, Administratrix,

PLAINTIFF, APPELLEE.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.
FROM JUDGMENT (FORD, J.), MAY 2, 1945.

TRANSCRIPT OF RECORD.

FRANCIS P. GARLAND,
HURLBURT, JONES, HALL & BICKFORD,
for Appellant.

THOMAS C. O'BRIEN,
for Appellee.

TABLE OF CONTENTS.

	PAGE
Court (Circuit Court of Appeals) and Title of Case	1
Transcript of Record of District Court:	
Title of Case in District Court, Massachusetts	1
Complaint	1
Answer	3
Motion to Amend Complaint	4
Answer to Second Count added by Amendment	5
Hearing	6
Defendant's Motion for Directed Verdict	6
Verdict on Count One	9
Verdict on Count Two	9
Judgment	9
Testimony	10
Testimony of Harrison I. Whitney	10
Helene A. Jesionowski	32
Earl M. Harvey	33
Albert J. Noel	49
John F. Sweeney	62
Francis T. Flynn	72
John F. Brady	91
Leonard J. Casey	93
Charge to Jury	98
Defendant's Exhibit No. 1,—Track plan	111
Defendant's Requests for Instructions	113
Notice of Appeal	114
Bond filed	114
Statement of Points	114
Designation of Contents of Record on Appeal	116
Certificate of Clerk of District Court	117
Enlargement of time for docketing case	118
Proceedings in U. S. C. C. A., First Circuit	119
Minute entry of hearing	119
Opinion, Stephens, J.	119
Judgment	123
Recital as to stay of mandate	123
Clerk's certificate	124
Order allowing certiorari	125

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

OCTOBER TERM, 1944.

No. 4108.

BOSTON & MAINE RAILROAD,
DEFENDANT, APPELLANT,

v.

HELENE A. JESIONOWSKI, ADMINISTRATRIX,
PLAINTIFF, APPELLEE.

TRANSCRIPT OF RECORD OF THE DISTRICT COURT.

No. 3079, CIVIL ACTION.

HELENE A. JESIONOWSKI, Administratrix of the Estate of Stanley S. Jesionowski, Plaintiff,

v.

BOSTON AND MAINE RAILROAD, Defendant.

APPEAL OF BOSTON AND MAINE RAILROAD, DEFENDANT, FROM JUDGMENT ON THE SECOND COUNT OF THE COMPLAINT ENTERED ON MAY 2, 1945.

The Complaint in this cause was filed on October 18, 1944, and was duly entered at the September Term of this court, 1944, and is as follows:

COMPLAINT.

[Filed October 18, 1944.]

A. This action is brought under the Federal Employers' Liability Act for the death of Stanley S. Jesionowski

by his widow, Helene A. Jesionowski, who was appointed administratrix of her husband's estate on September 11, 1944 by the Probate Court for the County of Essex and Commonwealth of Massachusetts. Both your plaintiff and the decedent were residents of Haverhill in the Commonwealth of Massachusetts at the time the decedent was fatally injured. The plaintiff brings this action for the benefit of herself as widow and for the benefit of her two minor children, Richard Jesionowski, aged eight, and Randolph Jesionowski, aged five, all three dependents of the decedent who have suffered great pecuniary loss.

The matter in controversy exceeds, exclusive of interest and costs, the sum of three thousand dollars.

B. During all the times herein mentioned the defendant, Boston and Maine Railroad, was a common carrier engaged in the business of interstate commerce, and on the day of the accident the plaintiff's decedent was employed by the defendant as a road brakeman on a freight train which was being operated in interstate transportation at Lynn, in the Commonwealth of Massachusetts, and at the time the decedent suffered his fatal injury, which is the basis of this action, both the decedent and the defendant were engaged in interstate commerce.

Count I. On or about July 1, 1944 while the plaintiff's decedent was employed by the defendant as a brakeman on a train of the defendant at Lynn, Massachusetts, it became and was his duty to take part in a switching operation which required him to ride upon a freight car which was one of a string of freight cars which was being pushed in upon a siding by a locomotive of the defendant. By reason of a defect or insufficiency, due to the negligence of the defendant, in its car, track, or roadbed, the car upon which the plaintiff's decedent was riding was derailed, and as a result of the derailment the decedent was thrown

from the car upon which he was riding under its wheels and instantly killed.

Your plaintiff further says that for the death of her decedent on July 1, 1944, as alleged above, she brings this action for the benefit of his dependents and demands judgment against the defendant in the sum of fifty thousand dollars and costs.

Plaintiff claims trial by jury.

By her Attorney,

THOMAS C. O'BRIEN,
11 Beacon Street, Boston, Massachusetts.

At the same term, on November 14, 1944, the defendant filed the following Answer:

ANSWER.

[Filed November 14, 1944.]

A. The defendant denies that the three dependents of the plaintiff's intestate have suffered great pecuniary loss, but admits the rest of the allegations of paragraph A.

B. The defendant admits the allegations of paragraph B of the complaint.

Count I: The defendant admits that on or about July 1, 1944, while the plaintiff's intestate was employed by the defendant as a brakeman on a train of the defendant at Lynn, Massachusetts, it was his duty to take part in a switching operation, but denies all the other allegations of Count I of the complaint.

And further answering the complaint the defendant denies that it was guilty of any negligence which contributed to the injuries and death of the plaintiff's intestate.

And further answering the complaint, the defendant says that the plaintiff's intestate was guilty of negligence

which was the sole proximate cause of his injuries and death.

And further answering the complaint, the defendant says that the plaintiff's intestate was guilty of negligence which contributed in whole or in part to his injuries and death.

By its Attorneys,

FRANCIS P. GARLAND,
HURLBURT, JONES, HALL & BICKFORD.

The cause was then continued from term to term to the present March term, 1945, when on April 26, 1945, the plaintiff files the following Motion to Amend Complaint, which motion is assented to by the defendant, and on the same day is allowed by the court, the Honorable George C. Sweeney, District Judge, sitting:

MOTION TO AMEND COMPLAINT.

[Filed April 26, 1945.]

Now comes the plaintiff in the above entitled action and respectfully prays that she may be permitted to amend her complaint by adding thereto a second count to read as follows:

COUNT II: On or about July 1, 1944 while the plaintiff's decedent was employed by the defendant as a brakeman on a train of the defendant at Lynn, Massachusetts, it became and was his duty to take part in a switching operation which required him to ride upon a freight car which was one of a string of freight cars which was being pushed in upon a siding by a locomotive of the defendant. As a result of the negligence of the defendant the car upon which the plaintiff's decedent was riding was derailed, and as a result of the derailment the decedent was thrown from the car upon which he was riding under its wheels and instantly killed.

Your plaintiff further says that for the death of her decedent on July 1, 1944, as alleged above, she brings this action for the benefit of his dependents and demands judgment against the defendant in the sum of fifty thousand dollars and costs.

By her Attorney,

THOMAS C. O'BRIEN.

4/26/45.

GEO. C. SWEENEY.

At the same term, on May 1, 1945, the defendant files the following Answer to the Second Count of the Complaint Added by Plaintiff's Motion to Amend, which on the same day is allowed by the court, the Honorable Francis J. W. Ford, District Judge, sitting:

DEFENDANT'S ANSWER TO THE SECOND COUNT OF THE COMPLAINT ADDED BY PLAINTIFF'S MOTION TO AMEND.

[Filed May 1, 1945.]

Now comes the defendant in the above-entitled action and answers the second count of the complaint as follows:

The defendant admits that on or about July 1, 1944 while the plaintiff's decedent was employed by the defendant as a brakeman on a train of the defendant at Lynn, Massachusetts, it was his duty to take part in a switching operation which required him to ride upon a freight car, but denies all the other allegations of Count II of the complaint.

And further answering the second count of the complaint, the defendant denies that it was guilty of any negligence which contributed to the injuries and death of the plaintiff.

And further answering the second count of the complaint, the defendant says that the plaintiff's intestate was

guilty of negligence which was the sole proximate cause of his injuries and death.

And further answering the second count of the complaint, the defendant says that the plaintiff's intestate was guilty of negligence which contributed in whole or in part to his injuries and death.

By its Attorneys,

FRANCIS P. GARLAND,
HURLBURT, JONES, HALL & BICKFORD.

On the same day, May 1, 1945, the cause comes on for trial on the pleadings and evidence before the court, the Honorable Francis J. W. Ford, District Judge, sitting, with a jury, and is fully tried on that day and on May 2, 1945.

On May 2, 1945, the defendant files the following Motion for Directed Verdict, which on the same day is allowed as to the first count and denied as to the second count by the court, the Honorable Francis J. W. Ford, District Judge, sitting:

DEFENDANT'S MOTION FOR A DIRECTED VERDICT.

[Filed May 2, 1945.]

Now comes the defendant in the above-entitled action and moves that the court direct the jury to return a verdict for the defendant on count I of the complaint, and specifies as grounds therefor the following:

1. The evidence is insufficient to warrant a finding that the defendant was guilty of negligence which was the proximate cause of the death of the plaintiff's intestate.
2. The evidence is insufficient to warrant a finding that the defendant was guilty of negligence which contributed to the death of the plaintiff's intestate.

3. The evidence is insufficient to warrant a finding that the defendant was guilty of any breach of duty to the intestate.
4. The evidence does not warrant a finding that there was any defect in the defendant's cars at the time and place of the accident.
5. The evidence does not warrant a finding that there was any defect in the defendant's track at the time and place of the accident.
6. The evidence does not warrant a finding that there was any defect in the defendant's switch at the time and place of the accident.
7. The evidence does not warrant a finding that there was any defect in the defendant's roadbed at the time and place of the accident.
8. The evidence does not warrant a finding that the plaintiff's intestate was injured by reason of negligence of the defendant as alleged in count I of the complaint.
9. The evidence requires a finding that if the intestate was injured through negligence he was injured through his own negligence.
10. The evidence requires a finding as a matter of law that the intestate's negligence was the sole proximate cause of his injuries and death.
11. The evidence requires a finding as a matter of law that the intestate's conduct was the sole proximate cause of his injuries and death.

And the defendant further moves that the court direct the jury to return a verdict for the defendant on count II of the complaint, and specifies as grounds therefor the following:

1. The evidence is insufficient to warrant a finding that the defendant was guilty of negligence which was the proximate cause of the death of the plaintiff's intestate.
2. The evidence is insufficient to warrant a finding that the defendant was guilty of negligence which contributed to the death of the plaintiff's intestate.
3. The evidence is insufficient to warrant a finding that the defendant was guilty of any breach of duty to the intestate.
4. The evidence does not warrant a finding that the derailment was due to any negligence of the defendant.
5. The evidence does not warrant a finding that there was any defect in the defendant's switch at the time and place of the accident.
6. The evidence does not warrant a finding that the plaintiff's intestate was injured by reason of negligence of the defendant as alleged in count II of the complaint.
7. The evidence requires a finding that if the intestate was injured through negligence he was injured through his own negligence.
8. The evidence requires a finding as a matter of law that the intestate's negligence was the sole proximate cause of his injuries and death.
9. The evidence requires a finding as a matter of law that the intestate's conduct was the sole proximate cause of his injuries and death.

By its Attorneys,

FRANCIS P. GARLAND,
HURLBURT, JONES, HALL & BICKFORD.

On the same day, the cause is thereupon submitted to the jury for consideration, and after hearing all matters and things concerning the same, the jury returns the following Verdicts:

VERDICT ON COUNT ONE.

May 2, 1945.

The jury find for the defendant.

EDWARD I. FARGO, *Foreman.*

VERDICT ON COUNT TWO.

May 2, 1945.

The jury find for the plaintiff, and assess damages in the sum of twenty thousand ($20,000) dollars.

EDWARD I. FARGO, *Foreman.*

At the same term, on May 2, 1945, the following Judgment is entered:

JUDGMENT.

May 2, 1945.

FORD, J. Upon the verdicts after trial in the above entitled action it is ordered

Judgment for the defendant on count one without costs, and judgment for the plaintiff on count two in the sum of twenty thousand ($20,000) dollars, and for her costs taxed at $.

By the Court,

JOHN E. GILMAN, JR.,
Deputy Clerk.

Enter May 2, 1945.

F. J. W. F.
U. S. District Judge.

From the foregoing judgment on the second count, the defendant on May 19, 1945 filed a notice of appeal to the United States Circuit Court of Appeals for the First Circuit.

TESTIMONY.

HARRISON I. WHITNEY (Sworn).

Direct Examination by Mr. O'BRIEN.

Q. 1. What is your full name? *A.* Harrison I. Whitney.

Q. 2. Where do you live? *A.* 6 Sylvan Street, Danvers.

Q. 3. What is your business? *A.* Locomotive engineer.

Q. 4. And you are employed by whom? *A.* The Boston and Maine Railroad.

Q. 5. And for how long a time have you been employed by the Boston and Maine Railroad? *A.* Forty-five years.

Q. 6. On July 1, 1944, were you employed by the Boston and Maine Railroad as engineer? *A.* I was.

Q. 7. Do you recall that day? *A.* I do.

Q. 8. Do you recall that there was an accident about 5:30 in the morning near Lynn? *A.* Yes.

Q. 9. What kind of a day was it? *A.* It was just daybreak, a clear day.

Q. 10. A clear day? *A.* Yes.

Q. 11. It was just about an hour or so after sunrise? *A.* Well, the sun had not come up.

Q. 12. The sun had not come up at 5:30? *A.* No.

Q. 13. All right. Will you tell the jury in your own way just what happened after you left West Lynn or went by West Lynn? *A.* I brought the train to a stop.

Q. 14. How many cars did you have? *A.* Forty-nine.

Q. 15. Yes. *A.* And the brakeman goes back to cut off four cars.

Q. 16. And the brakeman was who? *A.* Jesionowski.

Q. 17. He went back to cut off four cars? *A.* Yes.

Q. 18. He had been riding with you in the cab of the engine up to that point? A. Yes, sir.

Q. 19. And what did you see him do? A. Well, when he got back he apparently cut the cars off, I got a go-ahead motion.

Q. 20. After a time you got a go-ahead motion? A. Yes.

Q. 21. Was that by lantern or by hand? A. By lantern.

Q. 22. Did you observe where with reference to the track the brakeman was? A. On the ground.

Q. 23. On the north or the south side? A. The north.

Q. 24. You took the motion yourself? A. I did.

Q. 25. Now at that point is there a curve? A. No.

Q. 26. There is no curve at all there? A. Not noticeable.

Q. 27. So that the brakeman was on the north side of the west-bound track? A. He was.

Q. 28. When he gave you a signal to go ahead? A. Yes.

The Court. Are we going to use this plan with the engineer? I would like to have him make those marks so that we may be able to understand.

Mr. O'Brien. I don't know that it is particularly important up to this moment.

The Court. Maybe not. Use your own way.

Mr. O'Brien. I don't think it is important yet.

The Court. All right, sir.

Q. 29. On the north side is where the brakeman stood when he gave you the go-ahead motion? A. Yes.

Q. 30. When next did you see him? A. I took his go-ahead motion and started along.

Q. 31. Yes. A. And about the point that we got up to the switch I started looking back for more motions.

Q. 32. That is, as you approached the switch that I am pointing to now [indicating on blackboard sketch which was drawn by Mr. O'Brien during his opening]? A. Yes.

Q. 33. You looked back expecting a stop motion? A. I looked back expecting a stop motion, that is right.

Q. 34. As you looked back could you see the brakeman? A. Yes.

Q. 35. And where was he? A. On the side of the car.

Q. 36. On the side of the car? A. Yes.

Q. 37. And did you ultimately get a stop motion? A. I did.

Q. 38. And did you stop? A. I did.

Q. 39. And when you stopped did you observe the brakeman then? A. He got off the side of the car and went towards the switch.

Q. 40. You saw him get off the side of the car and still on the north side? A. Yes.

Q. 41. And go to the switch which I am pointing to here, is that right? A. Yes.

Q. 42. And that is to the north of the west-bound main track? A. That is right.

Q. 43. And could you see him as he was at the switch stand? A. No.

The Court. When he went to the switch did he go forward or backward?

The Witness. Simply opposite from where he was.

The Court. He was opposite the switch and he went sideways towards the switch?

The Witness. Yes.

The Court. All right.

Q. 44. That is, you mean he walked at right angles from the north-bound main to the switch? A. Yes.

Q. 45. You didn't see him operate the switch? A. No.

Q. 46. That was because of some obstruction? A. Because of some obstruction.

Q. 47. When next did you see him? A. He came back into view and gave a back motion.

Q. 48. Where did he come into view, was it between the switch stand and the track? A. As far as I could see.

Q. 49. That is, he was then north? A. North, yes.

Q. 50. Of the train, is that right? *A.* That is right.

Q. 51. And near the train, so you could see the motion? *A.* Sure.

Q. 52. Then what next did he do? *A.* I started to back up.

Q. 53. Yes. Did you see him again, then? *A.* Why, he apparently got on the side of the car again.

Q. 54. Did you see him get on? *A.* Well, that I couldn't say; he was on the ground and then on the car.

Q. 55. You saw him on the car? *A.* I did.

Q. 56. Did you get another motion? *A.* Yes.

Q. 57. When he was on the car you got a second motion? *A.* Yes, a back-up motion.

Q. 58. And you continued to back up? *A.* I did.

Q. 59. Then did you see something unusual happen? *A.* Apparently splinters of plank flying, going in the air.

The Court. Now wait a minute. Strike out that word "apparently". Tell us what you saw, not what apparently happened. What did you see, is what Mr. O'Brien is asking.

The Witness. There was splinters going in the air and it was a derailment and I immediately stopped.

Q. 60. Well, you didn't learn it was a derailment until after you stopped? *A.* No.

Q. 61. You saw the planks, splinters, flying? *A.* It was an unusual happening.

Q. 62. You saw planks, splinters flying first? *A.* I did.

Q. 63. How far had you backed at that time? *A.* Oh, three car lengths.

Q. 64. You think you had backed three car lengths at that time? *A.* Yes.

Q. 65. Then you made a stop immediately? *A.* I did.

Q. 66. How far did your train travel after you made the stop? *A.* Oh, two cars.

Q. 67. Two car lengths? *A.* Yes.

The Court. What was that question,—how far did the train travel after you made the stop?

Mr. O'Brien. Yes, your Honor.

The Witness. Yes.

Q. 68. You applied the air? *A.* Yes, I did.

Q. 69. And you traveled three car lengths before? *A.* Yes.

Q. 70. And then you traveled you say how far after that? *A.* Up to two cars. It wasn't over two.

Q. 71. That is, after you had applied the air you then continued two car lengths? *A.* Well, it seemed so.

Q. 72. How fast were you operating this train? *A.* Oh, probably five miles an hour.

Q. 73. And you had air on the train? *A.* Yes.

Q. 74. Could you stop within two car lengths with those cars on the train at 5 miles an hour? *A.* Sure.

Q. 75. Two car lengths is how many feet? *A.* Eighty.

Q. 76. Eighty feet, so it took you eighty feet to bring that train to a stop? *A.* Yes.

Q. 77. At five miles an hour with air, is that right? *A.* I am not certain.

Q. 78. Well now, you have been an engineer for 40 years? *A.* Yes.

Q. 79. Now, I want you to read this to yourself [passing papers to witness]. Does that refresh your recollection as to just how far you went after you had backed three car lengths? *A.* Ten or fifteen feet.

Q. 80. Is that correct? *A.* Yes.

Q. 81. So that after you got the second back-up motion you backed to the east? *A.* East.

Q. 82. A hundred and twenty feet? *A.* Yes.

Q. 83. And you saw planks flying? *A.* Yes.

Q. 84. At that time you were going 5 miles an hour? *A.* Yes.

Q. 85. And you applied your air? *A.* Yes.

Q. 86. Did you stop then within 15 or 20 feet? A. That is right.

Q. 87. Then did you get off the locomotive? A. Before I moved again, yes.

Q. 88. That is, you didn't move the locomotive after you made that stop? A. No.

Q. 89. What did you do then? A. I went across the cab to look out on the fireman's side.

Q. 90. And what did you see? A. That the cars were in a U-shape, that is,—and I immediately went back on the north side to see what had taken place.

Q. 91. That was on the engineer's side where you had seen Mr. Jesionowski? A. Yes.

Q. 92. What did you find? A. I found one end of the car had gone back down the main line.

Q. 93. You found it was on the main line? A. Yes.

Mr. O'Brien. I ask that be struck out, "had gone back".

The Court. Yes.

Q. 94. You found one end of the car on the main line? A. That is right.

Q. 95. And you found the other end where? A. On the north side.

Q. 96. On the north side or siding? A. The north siding.

Q. 97. Were the wheels on the tracks? A. No.

Q. 98. So there was a derailment of that fourth car from the engine? A. That is right.

Q. 99. Where was Mr. Jesionowski? A. Under the truck of the next car.

Q. 100. And that truck on the next car was on the north side of the west bound main? A. Yes.

Q. 101. Was it on the track? A. I don't remember.

Q. 102. You don't remember that? A. No.

Q. 103. Will you tell the court and jury what Mr. Jesion-

owski's condition was, not describing any of the details. Was he dead? A. Apparently.

Q. 104. Apparently dead. And was he under the wheels? A. He was.

Q. 105. Then what did you do? A. I got back to the engine and told the fireman and I went up to the draw-bridge which is west.

Q. 106. That is, towards me, if this plan is drawn correctly? A. Yes.

Q. 107. To get a telephone? A. Yes, and I telephoned the tower at Lynn what had taken place.

Q. 108. Well now, after that did you go back to the scene of the accident? A. I did.

Q. 109. And did you examine the switch? A. I did.

Q. 110. Will you describe to the jury just how one of those switches is operated? A. The two switch points are movable.

Q. 111. [Indicating on sketch on black board]. That is where I have very poorly drawn this plan. There are two switch points, you say? A. Yes.

Q. 112. Will you tell the jury what a switch point is? A. It is that part of the end of the rail that will move to allow the rail opening to go from one track to another. The two switch points are connected by two rods.

Q. 113. Two rods across like that between those two pieces of steel [indicating on black board]? A. Yes, sir.

Q. 114. Connected down from— A. There is a third rod that goes from the switch to the nearest switch point.

Q. 115. As I have drawn it here, is that right? A. Yes.

Q. 116. Now what does the man who wants to throw the switch do with reference to this switch stand? A. He unlocks the lock.

Q. 117. There is a lock on what, a hasp? A. Yes.

Q. 118. And throws a lever? A. Yes.

Q. 119. And that lever goes down over the hasp, and the

lock goes through? A. Yes, it is split after you get away from the handle, oh, that much [indicating with his hands] and then it goes off into a fork-shape, and that fork comes down over that hasp and the lock will come in here [indicating]. The handle has to be raised in order to throw the switch.

Q. 120. You lift the handle as I am doing now [indicating]? A. Yes.

Q. 121. And then you turn it, is that correct? A. Yes.

Q. 122. And when you turn it it operates this rod here [indicating on sketch] so it pulls or pushes these two pieces of steel which you call the switch points? A. Yes.

Q. 123. Is that right? A. Yes.

Q. 124. How long are those switch points, have you any idea? A. I should say seven or eight feet.

Q. 125. You say that the switch points are 7 or 8 feet? A. Yes.

Q. 126. The switch point narrows, does it, at the tip? A. Yes.

Q. 127. Now what did you find with reference to the switch? First, what did you find with reference to the stand? A. After the accident?

Q. 128. Yes. A. That the switch was set for the north siding.

Q. 129. That is, these points here [indicating on plan] were set so that the engine and the cars would move into the north siding, is that right? A. Yes.

Q. 130. What did you observe with reference to the switch stand? A. That the handle was down and the lock was in place but not locked.

Q. 131. The lock was in place? A. Yes.

Q. 132. The hook of the lock was in place? A. Yes, sir.

Q. 133. But it was not locked? A. That is right.

Q. 134. That is the customary thing because the brake-

man was going to let you out and then throw the switch again at the main later, is that right? A. Yes.

Q. 135. What did you observe with reference to the planks which you saw flying? A. I didn't pay any more attention to them.

Q. 136. Didn't you look for them? A. No.

Q. 137. I ask you to read this to yourself [passing papers to witness]. Does that refresh your recollection? A. Yes.

Q. 138. Did you after you had gone up and found Jesionowski then see these planks or splinters? A. I did not see them when I went back.

Q. 139. Did you see them at some time that morning? A. I think I did.

Q. 140. Where did you see them? A. Between the tracks.

Q. 141. Between the tracks where? A. On the north side.

Q. 142. On the north side and where with reference to the switch? A. The north side switch?

Q. 143. Yes. A. Why, under the car there somewhere.

Q. 144. Under the car? A. Yes.

Q. 145. And they were between the rails? A. Yes.

Q. 146. [Passing papers to witness.] Does that refresh your recollection now as to where you saw the plank splinters? A. I was just west of the switch.

Q. 147. You were just west of the switch when you saw the plank splinters? A. Yes.

Q. 148. By that you mean you were somewhere where I am placing my finger [indicating on sketch]? A. Along in there.

Q. 149. Somewhere west of the switch? A. Yes.

Q. 150. Where you saw the plank splinters? A. Yes.

Q. 151. Do you know how near the switch? A. No, no.

Q. 152. Now where this north siding crosses the north

rail of the west bound track, what do you call that junction there? A. A frog.

Q. 153. That is a frog? A. Yes.

Q. 154. Did you know what kind of a frog that was? A. No.

Q. 155. Do you know what kind of frogs are used on the railroad? A. Yes.

Q. 156. What kind? A. We have one that is open both ways all the time and then there is a spring frog that is set for one direction.

Q. 157. Now on the main line what is the frog?

Mr. Garland. I object to his asking what the frog was on the main line,—at this point I don't object.

The Court. I think that is what we are concerned with. I think counsel will be willing to confine himself to this point.

Q. 158. Do you know whether or not this was a spring frog? A. I think it was.

Q. 159. And what is a spring frog? A. You can go through it and the flange can go through from any direction but when in normal position the springs keeps a tight rail on the main line.

Q. 160. That is, these springs keep the point of the frog up against the main line? A. Yes.

Q. 161. And by the flange you mean that part of the rail inside the rail? A. That part of the wheel.

Q. 162. That part of the wheel which is inside the rail? A. Yes.

Q. 163. And that can insert itself and spring that open, isn't that so? A. Yes.

Q. 164. So the wheel can pass through? A. Yes.

Q. 165. Then that closes immediately afterwards? A. Yes.

Q. 166. So it operates by a spring and the spring is only in use when it is pried open by the flange? A. Yes.

Q. 167. And then it closes up? A. Yes.

Q. 168. Is that so? A. That is right.

Q. 169. And if that does not open when it is touched by a flange what happens? A. Probably a derailment.

Q. 170. Yes.—Mr. Stone suggests this question. How many times prior to July 1, 1944, did you back cars on the General Electric siding? A. We were doing it every night.

Q. 171. You did this every morning or every night? A. Yes.

Q. 172. That was part of your regular job? A. Yes.

Q. 173. So you were very familiar with this locus, place? A. Yes.

Cross Examination by Mr. Garland.

XQ. 174. On the day before when you used that same switch, did it work properly? A. Yes.

XQ. 175. Did it work properly afterwards, too?

Mr. O'Brien. Just a minute.

Mr. Garland. I want to find out what the condition was.

Mr. O'Brien. Did it work?

XQ. 176. Did you operate a train over it the next day? A. Yes.

XQ. 177. Did it work properly then? A. Yes.

XQ. 178. And it worked properly the day before? A. Yes.

XQ. 179. In other words, how long before this accident had you been operating freight cars over that same switch? A. On my job it was the previous morning that I went over it.

XQ. 180. You were over it the previous morning? A. Yes.

XQ. 181. Did it operate properly on the previous morning? A. Yes.

XQ. 182. On the next day afterwards? A. Yes.

Mr. Garland. Now I would like to put up the plan before I cross-examine this witness any further. May I ask that this be marked for identification?

The Court. It may be marked for identification.

[Defendant's Exhibit No. 1 for identification,—plan of locus.

[Conference at the bench not reported.]

The Court. It becomes convenient at this moment to take our morning recess. We will take it a little early, but I think it will serve.

[Morning recess.]

XQ. 183. [by Mr. Garland] That plan is marked Exhibit 1 for identification. You were speaking, Mr. Whitney, about certain frogs? *A.* Yes.

XQ. 184. Now those frogs were back about 75 to 80 feet from the switch point, were they? *A.* Something like that.

Mr. O'Brien. Does he know?

Mr. Garland. He says, "something like that." I will put the exact measurements in later.

XQ. 185. Now then, this plan, Exhibit 1 for identification, shows west to the right, towards Boston, and that is the Saugus River [indicating on Exhibit 1 for identification]? *A.* Yes.

XQ. 186. And this end of the plan shows to Lynn; that is, on the left of this plan is Lynn? *A.* Yes.

XQ. 187. And going towards the right is going towards Boston,—do you understand? *A.* Yes.

XQ. 188. And when you first came into this area [indicating on plan], you had 49 freight cars and your locomotive coming from the Lynn direction, is that right? *A.* Yes.

XQ. 189. You had come from Salem? *A.* Yes.

XQ. 190. All right. Now then, somewhere in this area [indicating on plan] that we are dealing with, Mr. Jesion-

owski had been riding with you in the cab of the locomotive? *A.* Yes.

XQ. 191. And then when you got into this place before you came to the switch Mr. Jesionowski left the cab and went back and cut four cars off the 49, is that right? *A.* That is right.

XQ. 192. So you then had four freight cars and a locomotive which were to go forward toward the Saugus River? *A.* Yes.

XQ. 193. Now then, you received, I understand, from Mr. Jesionowski after he had cut the four cars off a lantern signal to go ahead, is that right? *A.* That is right.

XQ. 194. And you continued to go ahead towards the Saugus River until you got from Mr. Jesionowski a lantern signal to stop? *A.* That is right.

XQ. 195. And when you stopped in response to that lantern signal was the front of your locomotive at a switch point or cross-over near the Saugus River where I am pointing on the plan? *A.* It was.

Mr. Garland. Now may I make a mark on that "A"?

The Court. Yes.

XQ. 196. In other words, I am marking the letter "A" at the point near the Saugus River where you say the front of your locomotive stopped after you had received a lantern signal from Mr. Jesionowski, is that right? *A.* That is right.

XQ. 197. Was the length of your locomotive between 71 and 80 feet? *A.* Around 80 feet.

XQ. 198. And were those freight cars about 40 feet? *A.* Yes.

XQ. 199. And was the space between every two cars for coupling purposes about 18 inches? *A.* About that.

XQ. 200. Now after you had received the signal from Jesionowski to stop you stopped, you say, at a point where the "A" is on the plan? *A.* Yes.

XQ. 201. Was it then that you saw Mr. Jesionowski go towards the switch stand? *A.* Yes.

XQ. 202. And then after he had gone towards the switch stand I understand you could not see him throw the switch because there was some obstruction between your cab and the point where the switch stand was located? *A.* That is right.

XQ. 203. So after you had seen Mr. Jesionowski go toward the switch stand did he then give you a signal somewhere from the ground to back up? *A.* He made a back-up motion.

XQ. 204. And is the switch stand at the point where I am indicating here [pointing on Exhibit 1 for identification] and I think I will put a "B" on it. You see the "B", that is the switch that is involved in this accident? *A.* Yes.

XQ. 205. I put a "B" there. Now when Mr. Jesionowski came from that point back toward the car, did he give you a lantern signal? *A.* He did.

XQ. 206. When you got the lantern signal from him was it a signal to back? *A.* It was a signal to back up.

XQ. 207. And what did you do? *A.* I started to back up.

XQ. 208. And did you next see Mr. Jesionowski on the side of one of the freight cars? *A.* Yes.

XQ. 209. And did he give you a second signal to back? *A.* He did.

XQ. 210. Had you already started backing by the time you got the second signal from him? *A.* Yes.

XQ. 211. And in making your movements forward and in stopping and in backing, did you rely on the signals which you got from Mr. Jesionowski? *A.* I did.

XQ. 212. Now then, you had backed, you said you started to back on the west-bound track? *A.* Yes.

XQ. 213. Then you had gone back, I think you said, three car lengths and then you saw these splinters somewhere go in the air? *A.* Yes.

XQ. 214. Then you continued backing for a short distance and stopped? *A.* I did.

XQ. 215. When you finally came to a stop, was the front of your locomotive near the switch marked "B"?

Mr. O'Brien. I object.

The Court. What is the objection?

Mr. O'Brien. On the form of the question.

The Court. It is a little leading but this is cross-examination and I think it is all right. You may have it.

XQ. 216. When you finally came to a stop after you saw the splinters in the air, was the front of your locomotive near the switch stand which is marked "B" on this plan [referring to Exhibit 1 for identification]? *A.* It was.

XQ. 217. On which of these tracks, the north siding or the main line track was the freight car which was next to the locomotive? *A.* On the north siding.

XQ. 218. It was on the north siding. And you had gotten off the locomotive when you came to a stop at the point you indicated and saw where these cars were located back of the locomotive? *A.* Yes.

XQ. 219. And was the next car to the locomotive—that would be the second one—was that also on the north siding track? *A.* It was.

XQ. 220. And the third car from the engine, the one next to that, was that on the north siding track? *A.* It was.

Mr. O'Brien. If your Honor please, I am going to object to this method of cross-examination, I don't know what the rule is here, but I have not examined on this particular subject matter that my brother is undertaking to cross-examine on now.

The Court. You presented him as your witness and he has a right to cross-examine him. There is no reason why he should not.

Mr. O'Brien. Excepting of course that he is a railroad employee.

The Court. That may be.

Mr. O'Brien. And I am forced to put him on as my witness.

The Court. You put him on as your witness and he has a right to cross-examine him, that is the only rule I know.

Mr. O'Brien. All right.

XQ. 221. Did you notice, Mr. Whitney, whether or not what I will call the lead trucks of the third car were off the rails after you got off the locomotive to examine the car? A. I could not say.

Mr. O'Brien. Just a minute. There isn't any testimony that he examined the car. That is what I am objecting to.

The Court. He has a right to lead.

Mr. O'Brien. Exactly, but he cannot lead him on something that this man has not testified to.

The Court. Mr. Whitney, we do not want you to testify to anything here that you have no knowledge about and I know that you don't want to.

The Witness. No, sir.

The Court. I might say to you as I say to a lot of witnesses, don't be too prone to agree with counsel on examination questions. If you have no knowledge of the matter about which counsel is inquiring, you can very readily say "No, or I don't know about that", "I didn't do that", "I didn't see that". Dont agree too soon with something about which you have no knowledge.

Mr. Garland. That is just what he said.

The Court. I only want him to testify with respect to those matters about which he has knowledge.

Mr. Garland. That is right, and he said he did not know.

XQ. 222. Did you examine the fourth car from the engine after you got off,—that would be the lead car,—did

you examine that to see what its condition was after the accident? *A.* I did.

XQ. 223. And were the lead trucks of that car on the main west-bound track? *A.* They were.

XQ. 224. And were the front trucks on the north siding track? *A.* Yes.

XQ. 225. In other words, that car was on a slant somewhat like that indicated by the pointer [placing pointer on plan]? *A.* That is right.

XQ. 226. You say you were backing about how many miles an hour? *A.* Five miles.

XQ. 227. About five miles an hour. Now you were asked by Mr. O'Brien about where you saw the splinters or where you looked for splinters after you stopped. I was not sure whether you meant that you had just left the switch or where the splinters were. Did the splinters go up in the air somewhere to the east of the switch point that is marked "B"? Is that where the splinters were? *A.* Yes.

The Court. Now so that this witness will understand the dimensions. Do you know that the question is where these splinters went up in the air? Do you know that that was the question?

The Witness. Yes, your Honor.

XQ. 228. Now where did they go in the air? *A.* East of the switch.

The Court. Where? How far east of the switch?

The Witness. Why, a matter of two car lengths.

The Court. Two car lengths east of the switch. Now be sure when you answer "Yes" that you have the knowledge in conformity with the question that is asked you.

The Witness. Yes.

The Court. Don't say "Yes" for the sake of saying Yes. What we want is the facts.

The Witness. All right.

The Court. This is not in criticism. I just want you to understand the procedure.

Mr. Garland. That is all.

Redirect Examination by Mr. O'Brien.

Q. 229. [Passing paper to witness.] Now you say that you saw the splinters flying two car lengths east of the switch, is that right? *A.* Yes.

Q. 230. And where were you then? *A.* I was west of the switch.

Q. 231. You were west of the switch in the cab of your locomotive? *A.* Yes.

Q. 232. But after the accident you found the splinters west of the switch, didn't you? *A.* No, no.

Q. 233. Right at the switch? *A.* No, no. Back.

Q. 234. What do you mean? Will you tell us now whether your recollection has been refreshed? *A.* No, this is wrong.

Q. 235. That is wrong as you testified this morning? *A.* Yes, that is east and I was west.

Q. 236. Where did you see the plank splinters?

Mr. Garland. Where was he or where was the plank?

Mr. O'Brien. I want to know where he saw the plank, where the plank splinters were.

The Witness. This question—.

Mr. O'Brien. No, no. Does that refresh your recollection?

The Court. What do you say now?

The Witness. The engine and I was west of the switch.

Q. 237. The engine and you were west of the switch? *A.* Yes, the splinters were east of the switch.

Q. 238. The splinters were east of the switch. Now let's get this right. This plan which Mr. Garland has marked, on which he has marked the switch with a "B", you and

the engine were west in the direction of Boston of the switch? A. Yes.

Q. 239. And the splinters were east of the switch? A. Yes.

Q. 240. Between the rails, is that right? A. Yes.

Q. 241. Between the rails. So when you said this morning that the planks, the splinters, were west of the switch that is not correct?

Mr. Garland. I don't think he said that.

The Court. I can't remember whether he said east or west, so I can't tell.

Mr. Garland. Do you remember saying this morning that the splinters we' west of the switch?

The Witness. I didn't get the question of where the splinters were but instead of where I was when I see the splinters.

The Court. Whether or not you said anything or whether you understood the question you now leave it that the splinters were east of the switch?

The Witness. The splinters were east of the switch and I was west of the switch.

Q. 242. Between the rails, is that right, the splinters were between the rails? A. They come up from under the cars.

Q. 243. Now you say you and the engine were west of the switch? A. When I stopped?

Q. 244. Yes. You were west of the switch? A. Yes.

Q. 245. Did I understand you to tell Mr. Garland that the engine was at the switch when you stopped? A. At the cross-over switch.

Q. 246. No, I am speaking about the other switch, the switch on the north side. A. At which stop was I making?

Q. 247. After you had made these moves down onto the north side? A. I was east of the switch.

Q. 248. You were what? A. East of the north side switch.

Q. 249. You just told Mr. Garland a minute ago that the front of the locomotive was at the switch point marked "B" and Mr. Garland marked it "B", right there [indicating on plan]? A. Yes.

Q. 250. Is that right? A. Yes.

Q. 251. What do you mean now when you tell us that you and the locomotive were west of the switch? A. No, I said east.

Q. 252. You said west a minute ago. Do you want to change that? A. It should be east.

Q. 253. You and the locomotive were east of the switch when you made the stop? A. Yes.

Q. 254. Is that the way you want to leave it now? A. Yes.

Q. 255. You told us this morning after you got your back-up motion the second time you backed up three car lengths? A. That is right.

Q. 256. Which is 120 feet? A. Yes.

Q. 257. Is that right? A. Yes.

Q. 258. You said 40 feet for a car? A. Yes.

Q. 259. Then you backed up 15 feet more and stopped? A. Yes.

Q. 260. So your total movement from west to east was 135 feet adding 15 to 120, is that right? A. Something like that.

Q. 261. Is that right? That is 120 and 15 or 135 feet, is that right? A. That is right.

Q. 262. So that to get this straight, you were then when you stopped your locomotive, you were west of the switch, having moved east from your first stop? A. No, I was east of the switch.

Q. 263. That is this 135 feet which you moved with the locomotive and four cars in an easterly direction? A. Yes.

Q. 264. That took you east of the switch, is that right? A. Yes.

Q. 265. The nose of your locomotive was at the switch? *A.* It was.

Q. 266. Is that right, as you told Mr. Garland? *A.* Yes.

Q. 267. And you had moved 135 feet? *A.* Yes.

Recross Examination by Mr. GARLAND.

XQ. 268. When you say you moved 135 feet, that is just a guess? *A.* Yes.

XQ. 269. Now as a matter of fact the front of your locomotive when you stopped was at that switch point marked "B", wasn't it?

Mr. O'Brien. Wait a minute. He said—

The Court. Never mind what he said. Let him say it now.

XQ. 270. Isn't it true that after you had backed in response to Jesionowski's signal and made the stop, the front of your locomotive was about at that switch point marked "B"? *A.* It was.

XQ. 271. Now you say your locomotive was 75 to 80 feet long,—I will call it 80 feet? *A.* That is right.

XQ. 272. And the cars were 40 feet long each? *A.* That is right.

XQ. 273. And there were four cars? *A.* Yes.

XQ. 274. Well, if you had four cars 40 feet long, that would make 160 feet, plus the locomotive 80 feet, plus the space between the cars for the coupling, you would have backed 246 feet if you estimate that way, wouldn't you? *A.* I think so.

Mr. O'Brien. Just a minute.

Mr. Garland. Four times 40—

The Court. Did you figure that out?

The Witness. Well the car length—

The Court. You tell us what you figured out in your mind so as to settle this thing. You take a piece of paper and pencil. I understand you are putting down on this

paper what you figure in your mind before you answer the question?

The Witness. Yes, sir.

XQ. 275. Now put down 80 feet for the locomotive.

The Court. Don't tell him. Let him tell us.

Mr. Garland. All right.

The Witness. [Figuring on paper] I make it 246 feet.

XQ. 276. That is what I make it. You have put down locomotive 80 feet? *A.* That is right.

XQ. 277. Four cars, 40 feet each, that is 160 feet, then you have written down here 6 feet for the draw bar, totalling 246 feet? *A.* That is right.

Redirect Examination by Mr. O'Brien.

Q. 278. So when you told us you moved 135 feet, that was not correct? *A.* I should say yes.

Q. 279. That it is correct? *A.* Yes.

Q. 280. It is correct? *A.* Yes.

Q. 281. You moved 135 feet? *A.* Yes.

Recross Examination by Mr. Garland.

XQ. 282. You figured the length of the cars and the length of the locomotive? *A.* Yes.

XQ. 283. And the space between the cars, the couplings? *A.* Yes.

XQ. 284. And you told us where the head of the locomotive stopped? *A.* Yes.

XQ. 285. Well, all right. And the other estimate of 135 feet is just a mere guess? *A.* Yes.

Redirect Examination by Mr. O'Brien.

Q. 286. And some of the other measurements that you have given us are guesses, are they not? You have been guessing about this, you didn't make any measurements? *A.* No, I did not.

Q. 287. You have been guessing about them? *A.* Yes.

Q. 288. And all of your measurements are guesses, is that right? *A.* Yes.

The Court. I think it is hardly fair. Was it your best recollection?

The Witness. All I had was two switch points for marks.

The Court. It is his best recollection.

Mr. O'Brien. But my brother is using the term "guess".

The Court. You have given the jury your best recollection?

The Witness. I have.

The Court. And you made no pretention of being accurate?

The Witness. No.

The Court. I think that is fair.

Mr. Garland. I think it is, too.

Mr. O'Brien. I think that is fair.

Recross Examination by Mr. Garland.

XQ. 289. Of course you have seen a good many freight cars during your 40 years as engineer? *A.* Yes.

Mr. Garland. That is all.

The Court. Are you through with this man?

Mr. O'Brien. Yes.

Helene A. Jesionowski (Sworn).

Direct Examination by Mr. O'Brien.

Q. 1. What is your name? *A.* Helene A. Jesionowski.

Q. 2. And where do you live? *A.* 322 Broadway, Haverhill.

Q. 3. You are the widow of Stanley Jesionowski? *A.* Yes.

Q. 4. Who was 32 years old when he died? *A.* Yes.

Q. 5. He left a child, a boy 8 years of age? *A.* Yes.

Q. 6. And a boy 5? *A.* Yes.

Q. 7. Is that right? *A.* That is right.

Q. 8. What was Mr. Jesionowski's health? *A.* Perfect health.

Q. 9. During the years you knew him? *A.* He was in very good health.

Q. 10. How long had you known him? *A.* Thirteen years.

Q. 11. He was employed by the Boston and Maine Railroad? *A.* That is right.

Q. 12. His business paid him $56.00 a week? *A.* That is right.

Q. 13. What did he do with the pay which he received from the Boston and Maine Railroad? *A.* He gave me the whole check.

Q. 14. You took care of the family, the four of you, out of that? *A.* Yes.

Q. 15. Paid his expenses and your expenses and the children's? *A.* That is right.

Mr. Garland. No questions.

Mr. O'Brien. You may step down. That is the plaintiff's case, if your Honor please.

[Opening statement by Mr. Garland, not written.]

EARL M. HARVEY (Sworn).

Direct Examination by Mr. GARLAND.

Q. 1. What is your full name? *A.* Earl M. Harvey.

Q. 2. Mr. Harvey, where do you live? *A.* Melrose, Mass.

Q. 3. How long have you lived in Melrose? *A.* Fourteen years.

Q. 4. And what is your business? *A.* Civil engineer, for the Boston and Maine Railroad.

Q. 5. Are you a little hard of hearing? *A.* A little some-

Q. 6. And in all how many years have you been employed by the Boston and Maine Railroad as a civil engineer? A. From 1902 to 1906 and then from 1914 to the present time.

Q. 7. Now at my request did you make some measurements and a plan of the scene of this accident? A. I did.

Q. 8. And is the plan which has been marked Defendant's Exhibit No. 1 for identification, the plan which you made? A. Yes.

Q. 9. And that was based upon measurements and a survey which you personally made? A. Yes.

Q. 10. Now you have indicated here [referring to plan] the compass points? A. Yes, the arrow points to the north.

Q. 11. North is toward the bottom of the plan? A. Yes.

Q. 12. And the other end points towards the south, the top of the plan being towards the south? A. Yes.

Q. 13. The right of the plan in a general way would be what we call west to Boston? A. Yes.

Q. 14. And the other end of the plan in a general way would be east? A. Yes.

Q. 15. That is, Boston would really be—what is the correct direction from the points of the compass? A. Boston is generally southwest but in traffic they generally speak of it as west, and Lynn station and Salem are spoken of as east.

Q. 16. Railroad men call Boston west and Portland east? A. Yes.

Q. 17. On the right you have indicated what you call the Saugus River? A. Yes.

Q. 18. And the Saugus River is between the switch point marked "B" and Boston? A. Yes, sir.

Q. 19. Now at the bottom I am indicating a building marked "Vacant Building" and there appears to be what, a fence? A. Yes.

Q. 20. And what is that vacant building? A. That building is not used, it is a cement building, I don't think it is

used, it was originally built as a signal tower but it is not used as a signal tower.

Q. 21. Now what is the distance between the cross over point marked "A" on that plan and this switch point marked "B" all towards what we call west of the plan, west of this building? *A.* That distance is 224 feet.

Q. 22. And that is based on your measurement? *A.* That is what I measured, yes.

Q. 23. Now at this point B, what is the distance between the two tracks, I am not speaking about rails, but the distance between the two tracks, the west-bound main track and the east-bound main track? *A.* 12.7 feet in the vicinity of those two switch points, that is the distance from center to center [illegible]

Q. 24 [illegible] distance between the two rails on the ma[illegible]and track? *A.* Four feet, 8½ inches, that is the standard gauge.

Q. 25. And that is true of the other track, the east-bound main line track? *A.* That is true of all tracks.

Q. 26. And that is true of what we have been calling the north siding? *A.* Yes.

Q. 27. Now let me ask you first of all, would this little picture which I have here show what we talk about as "frogs" [passing picture to witness]? *A.* The point at which I am indicating in the picture was where—

Q. 28. No, my question is, are those frogs? *A.* The point I am pointing to is called a frog.

Q. 29. Which is the frog? *A.* [referring to picture]. The frog is where the gauge of the right-hand rail in this picture of the north track crosses the left-hand rail of the main track.

Mr. Garland. Has your Honor seen that? Point out to the court where the frog is.

[Witness shows picture to the court.]

The Court. All right. Show it to Mr. O'Brien.

[Mr. Garland shows picture to Mr. O'Brien.]

Q. 30. What kind of frog is that, Mr. O'Brien wants to know? *A.* In that picture I can't tell, sir, what kind it is.

Q. 31. All right. What I want to get at is this: In this particular place, what is the distance of the frogs from the switch point and what has been marked on the plan with a "B"? *A.* The distance to the frog which is to your left or towards Lynn from that switch point marked "B" is 75½ feet.

Q. 32. And where is that frog? What track is it on,—the main line track or the spur track? *A.* The frog is on the north rail of the main track and the south rail of the north siding.

Q. 33. And you say it is 75 feet from the point marked "B" on the main line? *A.* Yes.

Q. 34. And this plan is drawn to scale, is it? *A.* Yes, sir.

Q. 35. And what is the scale? *A.* One inch equals 20 feet; that is, one inch on the plan represents 20 feet on the ground.

Q. 36. Now [indicating on plan] on the north side of the east-bound main line, you have a little black mark that says "Drawbridge gate"? *A.* On the southerly side.

Q. 37. Yes, on the southerly side. *A.* Yes, sir.

Q. 38. What is that,—what is that drawbridge gate? *A.* That is a gate, a standard holding a gate, and there is one also on the opposite side which are lowered when the drawbridge is to be opened.

Q. 39. Am I pointing now to the drawbridge gate, you pointed to the south side and there is one on the top of it on the north side? *A.* Yes, sir.

Q. 40. And that is to be closed when the drawbridge is opened? *A.* It is to be closed, to be lowered across the cartrack when the drawbridge is opened.

Q. 41. Now let me ask you, Mr. Harvey, what is a switch

point? A. A switch point is a part of the rails which are so designed that at the point this [indicating on plan] fits up against the main rail in such a way as to direct the wheels from either the straight track to continue on the straight track or when that is opened to permit it to go from the side track onto this main track.

Q. 42. I have a little picture [passing picture to witness]. Point out what the switch point is on that little picture. A. The switch points,—there are two of them,—one on each rail, one on the rail of the main track, and one on the rail of the side track which are tied together so that these rails can be moved from side to side from the switch stand to permit the trains to either continue on the straight track or go from the siding onto the straight track and vice versa.

[Mr. Garland passes picture to the court. Conference at the bench, not reported.]

Q. 43. What was the length of the switch point in this case? A. 15 feet.

Q. 44. Now, Mr. Harvey, will you step down here and take that blackboard and draw the switch point so that we may understand just what it is?

[Mr. Harvey goes to blackboard.]

Q. 45. Draw a switch; that would be an easy way to draw the rails lengthwise. Now so I won't be leading you, go on and explain to the jury where the frog or frogs were and where the switch point and the heel of the switch point were and in your own way tell the jury about it. A. I have drawn what represents a main line track and this siding, that is a north siding coming into this main line. At the point I am indicating, which would be the west rails of the main track, Boston being towards the—

Mr. O'Brien. Did you say west or north?

The Witness. West.

Mr. O'Brien. Well, it should be north, shouldn't it?

The Witness. To Boston.

Mr. O'Brien. West of Boston, north of where you are pointing, isn't that the north rail?

The Witness. This is the north rail, yes.

Mr. O'Brien. Yes.

The Witness. That is the north rail of the main track as the train travels west to Boston. And that [indicating on plan] is a point 15 feet long which is separated from the gauge of this rail at this point—

Mr. O'Brien. He is using the word "point" in two ways. He is using point as a place and also to describe a piece of rail. I think the jury should know the difference.

The Court. Use the other word location.

The Witness. This 15-foot rail represents the switch point but the point of the switch is at this end which is in this case the westerly end of the switch. The other switch point, the 15-foot point I am pointing to on the board here is the southerly rail of the north siding. When this switch is set to permit the continuation of trains on the main line a switch is in this position [indicating on board] as drawn on the board. That permits the flange of the rail—

Mr. O'Brien. You mean of the wheel?

The Witness. —the flange of the wheel to the gauge of the rail to pass through this switch without interference, and I am pointing to the south rail of the main track and also the north rail of the main track to continue without interference on the track towards Boston. When the switch is set to permit entrance from a siding like this north siding this 15-foot switch point with a pivot at the points where I have made a little mark—

Q. 46. That is the heel of the switch? A. That is the heel of the switch, that is thrown to the south or its pivotal point is thrown to the southerly rail of the main track where there is an opening of 4¾ inches on whichever side the switch is turned for, if turned for the main line it is 4¾ inches at the southerly rail opening between the two rails;

if it is thrown for the north siding it is 4¾ inches between the north point and the north main rail.

Q. 47. Now, Mr. Harvey, are there some rods down where I am pointing on this chalk sketch that hold the two switch points together? *A.* Yes, sir, those are tie rods.

Q. 48. Tie rods, and is the switch point at the place I am indicating where the tie rods are connected in some way with the mechanism by which the switch is operated? *A.* The left-hand or westerly rod in this case continues under the rail to the switch stand which I have shown to the west of the switch.

Q. 49. Now tell us how the switch points are operated by means of this switching device. You told us there were connecting rods, one running under the rails right over to the switch apparatus or device—was this what you call a hand switch, at this place? *A.* Yes, sir.

Q. 50. Now tell us how you operate it when you want to throw that switch. Suppose for instance that switch is set as indicated in the drawing on the blackboard and a train moves along in the direction—that would be the northerly direction [indicating on board]? *A.* The westerly direction.

Q. 51. The westerly direction. Now then, if you want to put that train on this spur side track what would you do with that switch? *A.* The operation is to unlock the lock, remove this lock from a socket which holds down a lever. With that lock out you raise this lever and as this is raised, this lever, it raises a section of the switch stand and this having a square column separates this upper section of the square column from the lower and then the handle is turned and it is turned until it fits this square lower section again so that the upper square section can drop down over the switch and in this movement this switch is thrown whichever side it is set to the opposite side.

Q. 52. Now as the switch is set as indicated in that draw-

ing a train moving from the lower left-hand corner would continue along on the main line? A. Yes.

Q. 53. Now then, supposing you wanted to put that train on that side track, how would you throw that switch? A. The switch would be thrown in this sketch from north to south or from left to right.

Q. 54. Would a man throw that to his left or right? A. In that particular switch I can't say. I never threw it.

Q. 55. Well, when a man did throw this switch by hand for the use of a train which we will say was going down on the spur track, would he throw it then so that the switch point I am indicating would be up close against that rail and the switch point on the opposite side would be 4¾ inches away from the rail? A. That is correct.

Q. 56. Now to make it clear. When you say the switch point is 15 feet long, you mean the distance from what we call the heel of the switch that I am indicating to the tip of the switch is 15 feet? A. Yes, sir.

Q. 57. That is true on either side? A. Yes.

Q. 58. Then the tie rods that you have spoken about are at the sharp end of the whole thing that is called the switch point? A. Yes, sir.

Q. 59. In other words, the switch point consists of two rails 15 feet long moving on a pivot or what we call the heel of the switch? A. Yes, sir.

Q. 60. And then the tip of it moves against the rail or away from the rail according to what operation you want to make or what movement you want to make, rather, of the train? A. That is correct.

Q. 61. Do you need to make any other chalk drawing to show where the frog was or indicate what the frog was? I mean the frog in this particular place. You say it is about 75 feet, 75 feet from what point? A. The point of the switch is 75½ feet from the point of the frog, the point of the frog is 75½ feet from the switch.

Q. 62. From the point of the switch. Do you mean the sharp end of the switch as I have it marked "B"? *A.* Yes, sir, the very westerly end of the switch points.

Q. 63. The westerly end of the switch points, or what is indicated on the plan as "B"? *A.* Yes.

Q. 64. To the frog or frogs. There are two frogs? *A.* No, one frog.

Q. 65. The point is 75 feet? *A.* Yes.

Q. 66. Now will you sketch a frog so that the jury will know what it is like?

[Witness draws on board.]

Q. 67. Now tell us what that is. Step over here and use the pointer. Tell us what the frog is, what it is made of and its dimensions. *A.* There has been something spoken about a spring frog. I don't know whether this is a spring or a stiff frog. The idea of operation is very simple.

Q. 68. Go ahead and explain whichever it was, and make what drawing you want and then stand on this side. *A.* The idea of the frog is to open a flange-way when one track crosses another so that the wheels will not ride on or jump over the rail and that is done by a frog similar to this design. If a train in this case were coming on the main line the northerly wheel would be up against the southerly point of the frog and continue on that right over this gap onto the still on the northerly rail of the main line. A train coming out at the north siding runs into this frog and the southerly wheels will ride on this side of the frog that I am pointing to and go over the gap onto the rail which leads to this southerly switch point.

Q. 69. Mr. Harvey, what is the distance between the wheels of the truck under the last freight car? *A.* The distance between the wheels?

Q. 70. Yes, under the freight car. *A.* Under a freight car?

Q. 71. Yes, the average car.

Mr. O'Brien. Now, I object to that, if your Honor please.

Q. 72. The lead car,—have you the dimensions of the lead car of this particular train? *A.* Yes.

Q. 73. That is what I want. What is the distance between the nearest wheels of the truck on the lead end and the truck on the other end? What is the distance? *A.* [Reading from paper.] I have car No. 72643. The distance between the trucks on each pair of trucks, center to center of the truck is 5 feet, 6 inches. The distance between the center of one set of trucks to the center of the other set of trucks—no—the distance between the nearest wheels of one set of trucks to the other set of trucks is 25 feet, 9 inches.

Mr. Garland. That is all.

Cross Examination by Mr. O'Brien.

XQ. 74. Will you just draw a freight car, a box car? This was a box car that you have given dimensions of? *A.* Yes.

XQ. 75. Will you draw one on the blackboard? The dimensions which you have given Mr. Garland, 25 feet, something, where are they? *A.* The distance of 25 feet, 9 inches, is from the center, the distance between the nearest wheels of one pair of trucks to the other.

XQ. 76. How far are the wheels nearest the ends of the car distant from the end of the car? *A.* I shall have to compute that.

XQ. 77. Then strike it out for the moment. What is the distance between the point which you have marked here? Is that the center of the wheel you have there? *A.* Yes.

XQ. 78. What is the diameter of the wheel? *A.* I don't know.

XQ. 79. What is the tangent distance between those two wheels? *A.* The tangent distance?

XQ. 80. Yes. *A.* The shortest distance is 25 feet, 9 inches.

XQ. 81. Is that the shortest distance? *A.* That is the distance from truck to truck.

XQ. 82. What is the distance between these two wheels? I am speaking now of the distance between the two runs of the wheels. *A.* I don't know the size. I couldn't tell.

XQ. 83. You don't know the size of the wheel? *A.* No, sir.

XQ. 84. You don't know its radius? *A.* No, sir.

XQ. 85. What is the distance between the point which you have marked there as the center of the wheels, I take it, and the end of the car? *A.* That is, you want this particular wheel, the inside wheel?

XQ. 86. No, I want it right from the two points. You have made two points there. Mark them A and B so we won't be confused. Between the point B, and mark the continuation of the end of the car C. *A.* [Witness draws on board and computes distance.]

XQ. 87. I take it you are computing? *A.* 5 feet, 6 inches.

XQ. 88. 5 feet, 6 inches? *A.* Yes.

XQ. 89. What is the length of that freight car? *A.* The length of this car from the bunters is 44 feet, 9 inches.

XQ. 90. From the bunters, you mean from the end of each knuckle at the end of the car, that is, between the two knuckles. Put knuckles on those cars.

[Witness draws on board.]

XQ. 91. Now will you tell the jury what you mean by that distance of 44 feet? *A.* The distance from knuckle to knuckle.

XQ. 92. That is the end of each knuckle, from the end of one knuckle to the end of the other? *A.* It would be the distance between the knuckles if the train was moving continuously.

XQ. 93. And the knuckles were closed? *A.* The knuckles were closed.

XQ. 94. The knuckles were not open? *A.* That is correct.

XQ. 95. You say that distance is— *A.* 44 feet, 9 inches.

XQ. 96. All right. What is the length of the box car apart from the knuckles? *A.* 42 feet, 3 inches.

XQ. 97. So you really have 2 feet, 6 inches between two cars, is that right? *A.* Yes.

XQ. 98. Not 18 inches as was said by Mr. Harrison Whitney? *A.* I am talking about—

XQ. 99. I am talking about these cars. You have 2 feet, 6 inches, is that right, between the cars? *A.* Yes.

XQ. 100. Now you are speaking about the fourth car, that is what I understand. *A.* The rear car of the string of four.

XQ. 101. All right. What is the measurement of the next car to the fourth? *A.* I don't know.

XQ. 102. Didn't you get any information on that? *A.* No, sir, I don't even know the number.

XQ. 103. Did you get it on the next car? *A.* No, sir.

XQ. 104. Did you get it on any other car but the fourth car? *A.* No, sir.

XQ. 105. Where did you get it on the fourth car? *A.* Where did I get the number?

XQ. 106. Where did you get the measurement? *A.* From the company record of this particular car.

XQ. 107. Did you ask for any record on the other cars? *A.* No, sir.

XQ. 108. Do you know whether the other cars were 60-foot cars or 35-foot cars or 40-foot cars? *A.* I don't know anything about it.

XQ. 109. You don't know what the length of the other cars was? *A.* I do not.

XQ. 110. But you have got a 44-foot car here for the last car? *A.* That is correct.

XQ. 111. Now what kind of a frog is that? *A.* I couldn't tell you, sir.

XQ. 112. You have drawn it. *A.* I made no particular measurement.

XQ. 113. No, I am speaking about your diagram. *A.* My diagram is what we call a stiff frog.

XQ. 114. A stiff frog? *A.* Yes.

XQ. 115. There is such a thing as a spring frog, isn't there? *A.* That is correct.

XQ. 116. Didn't you observe that that was a spring frog at that point? *A.* I didn't. It could have been, I did not observe it.

XQ. 117. You measured to it? *A.* I did.

XQ. 118. You don't know whether it was a spring frog or a stiff frog? *A.* I do not.

XQ. 119. Now what is the difference between a spring frog and the frog you have drawn there? Draw a spring frog, will you? *A.* Yes, sir. [Witness draws on blackboard.] I have drawn a sketch to represent the difference between the spring frog and the rigid frog. The spring frog has an arm to which I am pointing which in this case would represent a guard, which comes right up next to the southerly rail on the north siding. Now if a train was operating to enter the south siding with this kind of a frog the trucks when they struck the frog would come up against a guard rail which I have represented here by a curve to the left of the frog. That is on the other rail, the north rail on the north siding, and connects with this guard rail; the other wheel would throw this guard over, bring it over here so that there would be this flange-way distance between the point of the frog and the wheel on the frog, and after the wheels had passed through it would spring back into position shown on the plan. A train coming on the main line

either from east to west or from west to east would have practically no effect upon the spring frog because it would be protected from entering or having any interference—

XQ. 120. I didn't ask you about that. I asked you to describe a spring frog. *A.* I am trying to.

XQ. 121. You have told us it is a spring which controls the rail? *A.* The spring opens this opening and closes it.

XQ. 122. What is the opening? That is the opening between the two rails? *A.* The guard rail is separate from this other rail. A train is protected on the main line from opening this spring rail by this guard rail which is up against the southerly rail or the main track in this case.

XQ. 123. The spring frogs are used usually on main line tracks? *A.* They are, yes, a good deal.

XQ. 124. And you don't know whether this was a spring switch or not? *A.* I do not.

XQ. 125. That is what happens. There is something of this sort, that is, you have a situation where the rail is up against the other rail, isn't that right, similar to this here on this switch point? *A.* You refer to this guard rail?

XQ. 126. No, I am talking about the two pieces of rail, these two pieces of rail. Isn't this rail here,—and I am speaking now of the north rail of the main track, up against the south rail of the north siding? *A.* At the point.

XQ. 127. Yes, at the point. So when you get in here the flange of the south wheel of the car pushes this open, doesn't it? *A.* From going on the north side.

XQ. 128. Pushes it to the north and that is the flange of the wheel that does that? *A.* That is right.

XQ. 129. So there is just a little opening there for that flange to go in? *A.* Whatever is necessary for that flange to go in.

XQ. 130. And that swings it like that [indicating on board]. That is, it would go to the north and admit that

part and then the wheels having passed it would snap right up against the rail again? A. That is correct.

XQ. 131. And that motion is operated by the flange of the wheel? A. Yes.

XQ. 132. And the gauge is maintained by this guard? A. That is right.

XQ. 133. And if that did not open then there would be a derailment, isn't that right, if it didn't open there would be a derailment?

Mr. Garland. Let me ask a question.

The Court. Answer if you can.

Mr. Garland. Let me ask you—

The Court. Strike it all out. Ask your question again all over again.

Mr. O'Brien. All right, your Honor.

XQ. 134. And if that did not open then there would be a derailment, isn't that right, if it didn't open there would be a derailment? A. I can't picture why.

XQ. 135. I don't want any reason at all. You can answer that Yes or No. A. Well, I can say this, I don't know, because that is not the only element that enters into what might cause a derailment.

XQ. 136. You have my question. If that does not open, my question is, there would be a derailment, is that so? A. I can't say because I don't know why it would not open.

XQ. 137. You can't take the premise that if it does not open? A. No, sir, because that—

XQ. 138. Just a moment, please. You have anything to do with switches, the manufacture and building of switches? A. Do I have anything to do with them?

XQ. 139. With the building of them, the construction of them. A. I have done some designs on them.

XQ. 140. All right. Now answer my question, if you haven't answered it. A. I can't answer that because I never knew a condition—

XQ. 141. You never knew of a derailment due to the frog? *A.* I never knew a derailment because it didn't open.

XQ. 142. You never knew a derailment because it didn't open? *A.* No, sir.

XQ. 143. They always open? *A.* There is something else besides opening which causes a derailment.

XQ. 144. They always open? *A.* I have always known them to open, yes.

XQ. 145. They are just springs, isn't that what you call them, springs? *A.* A spring controls this arm; the operation of a train of cars is controlled by the guard rail.

XQ. 146. So if the guard rail and the springs are all right, then the flange goes through all right? *A.* Yes.

XQ. 147. If the flange is not right, if the guard rail is not right and the springs are not right, it won't go through, will it? *A.* I couldn't answer that.

XQ. 148. You couldn't answer that? *A.* I couldn't answer what would happen because I don't know of any such condition.

XQ. 149. But those are the things that are necessary to make it operate properly? *A.* That is the way it is.

XQ. 150. A proper flange, a 'proper' guard rail, and proper springs,—isn't that so? *A.* Yes, sir.

XQ. 151. Now if all of them are out, will it operate properly? *A.* I don't know what would happen.

XQ. 152. No, you don't. According to your plan here, if these cars were all 44 feet, 9 inches, instead of the 49 feet talked about by Mr. Garland, the length of your train would be 259 feet instead of 246, isn't that so? *A.* I don't know the length of the engine.

XQ. 153. 80 feet. *A.* Yes, assuming that you have four cars 44 feet, 9 inches.

XQ. 154. Yes, sir. *A.* And the engine 80 feet long.

XQ. 155. Yes. *A.* The distance would be 259 feet.

Mr. O'Brien. I think that is all.

Redirect Examination by Mr. Garland.

Q. 156. Mr. Harvey, if the rear car straddled that switch when it was thrown and the train was then backed, what would happen?

Mr. O'Brien. I object.

The Court. On what ground?

Mr. O'Brien. On the ground that he doesn't know anything about switches or frogs.

The Court. We will take the noon-time recess; 2:15.

[Noon recess.]

Afternoon Session.

Mr. Garland. I would like to have this plan marked as Defendant's Exhibit No. 1.

Mr. O'Brien. I object to that.

The Court. On what ground?

[Conference at the bench, not reported.]

Mr. Garland. I will ask now, your Honor, that the plan be marked as a defendant's exhibit.

The Court. Yes, and that is Exhibit No. 1.

[Exhibit No. 1, formerly marked Defendant's Exhibit No. 1 for identification; plan is marked Defendant's Exhibit No. 1.]

Albert J. Noel (Sworn).

Direct Examination by Mr. Garland.

Q. 1. What is your full name? *A.* Albert J. Noel.

Q. 2. And you spell it N-o-e-l? *A.* Yes, sir.

Q. 3. Where do you live? *A.* 167 Fairmount Avenue, Lynn.

Q. 4. How long have you lived in Lynn? *A.* All of 25 years.

Q. 5. What is your business or occupation? *A.* I am assistant foreman on the Boston and Maine Railroad.

Q. 6. And do you have any particular department that you are foreman in? *A.* The car department.

Q. 7. How long have you been connected with the car department of the Boston and Maine Railroad? *A.* About 23 years.

Q. 8. What are your duties in connection with that particular job? *A.* Well, last year I have been re-railing cars, wreck master.

Q. 9. Re-railing cars? *A.* Yes.

Q. 10. On the morning of July 1 last year, did you go down to the scene of this accident where Mr. Jesionowski had been killed? *A.* I did.

Q. 11. About what time did you get down there? *A.* I should say between 7 and quarter past, something like that.

Q. 12. And when you got down there, what was the condition of the cars? There had been a string of four cars attached to this locomotive; you tell the jury what you found when you got down there. *A.* I found two box cars one facing Lynn, the lead truck was on the main line and I found the other truck of that same car off the rail on the side track and the next truck of the next car was off the rail on the side track.

Mr. Garland. Do you mind if I ask a leading question?

Mr. O'Brien. No.

Q. 13. Mr. Noel, you found, I understand, four cars? *A.* There were four cars, yes, sir.

Q. 14. And one of the cars, that is, the rear car, you said had the trucks toward Lynn on the main west-bound track? *A.* Yes.

Q. 15. The front truck, that is, the truck of that rear car which were nearer to the engine, I think you said were on the side track, is that right? *A.* They were on the side track off the rail.

Q. 16. When you say "off the rail", will you tell us just what way those trucks were off the rail on the side track?

A. They were off the rail side of the rail facing Lynn, they were on the G.E. side of the rail.

Q. 17. When you say "G.E.", you mean the General Electric? A. The General Electric plant, yes, sir.

Q. 18. And the General Electric Company has a plant along here which would be on the north side of the track, is that right? A. Yes, sir.

Q. 19. And as I understand it, the trucks of the rear car which was the fourth car, that is, the trucks which were nearer the locomotive, were derailed so that the wheels on one side of the truck were between the rails of the track? A. Yes.

Q. 20. And the other wheels on that same truck were between the northerly rails of the track and the General Electric, is that right? A. Yes.

Q. 21. Now tell us the position of the trucks of the next car, that is, the third car from the engine or the car which was next to the one you just described? A. One truck was off and in the same position as the other truck.

Q. 22. Which truck was off the rail? A. That would be the trucks facing Lynn.

Q. 23. The trucks which would be nearer to the fourth car? A. That is right.

Q. 24. Those trucks were off? A. Yes.

Q. 25. And was their position very much like the position of the trucks of the fourth car you just described? A. Yes.

Q. 26. That is to say, two wheels of those trucks were between the rails of the spur track and two were between the rails of the track and the General Electric Company? A. That is right.

Q. 27. Now then, where were the other trucks of that third car? A. The third car from the engine?

Q. 28. Yes. A. They were on the rail.

Q. 29. On which track? A. They were on that south side of the north siding track.

Q. 30. On the rails, on what has been called the spur track? A. Yes.

Q. 31. Now where were the trucks of the next car, second from the locomotive? A. They were on the rails too.

Q. 32. Were they all on the rail, both sets of trucks on that second car? A. Yes, sir.

Q. 33. Where were the trucks of the third car which was nearest to the locomotive? A. That was on the track, too.

Q. 34. Which track? A. The north side track or the spur track.

Q. 35. In other words, as I understand it, both trucks of the third car nearest the engine, both trucks of that car were on the siding rail, the north siding rail? A. They were on the track, yes, sir.

Q. 36. And that is true also of the next car,—that would be the second one from the engine,—both trucks of the second car from the engine were both on the rail of the spur track, which we call the north siding? A. Yes, sir.

Q. 37. And when you got to the third car the trucks of that car which were near the second car from the locomotive were on the rails? A. That is right.

Q. 38. But the trucks nearer the last car, were two wheels between the rails and two wheels outside the rails towards the General Electric Company? A. Yes.

Q. 39. And the fourth car the trucks near the third car were derailed, two of the wheels being between the rails of the spur track and two being opposite the rail toward the General Electric Company? A. Yes.

Q. 40. But the rear trucks of that car were still on the main line track? A. Yes, sir.

Q. 41. And was it something like that, the rear trucks were on the main line track and the front trucks were derailed on the spur track? A. Yes, sir.

Q. 42. Now will you tell us what you did when you got down there and when you re-railed the car, what did you do? *A.* First I got myself in position to put the truck on the track.

Q. 43. First you started to put the rear truck or the trucks nearest to Lynn on the last car from the main line over onto the spur track? *A.* Yes, sir.

Q. 44. Was that for the purpose of having the entire train on the spur track? *A.* I presume it was. My orders were to do that.

Q. 45. Your orders were to do that? *A.* Yes.

Q. 46. How did you do that, how did you lift the trucks of the last car from the west-bound main line onto this north siding, how did you do it? *A.* I worked from the Lynn end of the train with our work train on the main line; that is, the west-bound main line. I picked up the body of the truck and swung it over and placed it on the siding.

Q. 47. And when you did that were all four cars of that train then except the derailed ones on the spur track? *A.* To the best of my knowledge they were, yes.

Q. 48. Now when you got those rear trucks on the north siding, what did you next do? *A.* I moved up in between the opening between the two cars.

Q. 49. Which cars? *A.* The third and fourth cars.

Q. 50. What did you do? *A.* I lifted the second end of the last car on the car, I just lifted the further end up to break the coupling apart.

Q. 51. To break the coupling between that car and the one next to it? *A.* The third one from the end, yes.

Q. 52. And you got that done? *A.* Yes.

Q. 53. And then did you put those trucks back on the rails on the north siding track? *A.* Yes.

Q. 54. What did you do next? *A.* I lifted the trucks and

the body of the next car, lifted them up and re-railed that truck.

Q. 55. That is, you took the trucks of the third car from the locomotives and took the trucks of that car which was nearest to the last car and got those on the rail? A. Yes.

Q. 56. And when you did all that were the entire four cars then on the rails of the north siding? A. To the best of my knowledge they were. I couldn't say what was done near the engine, I knew they were on the rails.

Q. 57. What kind of flanges were there on the wheels or trucks of the rear car, the fourth car from the engine, what kind of flanges? A. What we call dull flanges.

Q. 58. What do you mean by dull flanges? A. A flange that won't take the gauge—

Q. 59. What? A. They are still serviceable flanges.

Mr. O'Brien. I ask that that go out.

The Court. It may go out.

Q. 60. Are there two kinds of flanges sharp and dull flanges? A. There are, yes.

Q. 61. And those were what you call dull—

Mr. O'Brien. No.

Mr. Garland. I withdraw the question.

Q. 62. Now did you make an examination of the trucks which had been derailed? A. I did.

Q. 63. Did you examine them? A. Yes.

Q. 64. And did you examine also the trucks of the fourth car from the engine which had remained on the main line west-bound track? A. Yes, I did.

Q. 65. Tell us what you found upon your examination the condition of those trucks to have been, what was the condition of those trucks as you examined them?

Mr. O'Brien. What trucks are you talking about?

The Witness. The trucks were all right after they were re-railed.

Q. 66. In other words, after you had moved the rear

trucks which had been on the main line track over to the north siding you say they were then all right? A. Yes.

Q. 67. Were they all right before you moved them?

Mr. O'Brien. Just a minute.

The Court. What is the matter with that? What was their condition before you moved them?

Mr. O'Brien. If he knows. There has not been any testimony that he knows what they were.

The Court. We won't get it until we hear him. You certainly are not testifying except to what is within your own knowledge.

The Witness. No, sir.

Q. 68. Were they all right before you moved them? A. I didn't look at them then.

Q. 69. All right. Now, then, did you examine the trucks of the last car which were nearer to the engine, did you look at them or make any examination of any kind before you put them back on the rail? A. No, sir, I did not.

Q. 70. Did you after you put them on the rail? A. Yes, I did.

Q. 71. Well what did you find to be the condition of those trucks of the last car which was nearest the locomotive and which had been derailed, after you put them back on the rails, what did you find their condition to be? A. I found them all right.

Q. 72. Now, then, at some time during your operations down there, did you examine the trucks of the next car to the last one that had been derailed? A. I did.

Q. 73. And when did you examine them,—before or after you re-railed them? A. After I re-railed the trucks.

Q. 74. And when you re-railed them and put them back on the rails of the north siding what was their condition? A. They were all right.

Q. 75. Now were those the only trucks on the four cars that had been off the rails? A. Yes.

Q. 76. That is to say, the trucks of the last car, the trucks nearer to the engine, those had been off and you re-railed them? *A.* Yes.

Q. 77. Then the trucks of the third car from the engine, the trucks near the last car had been off and you re-railed those? *A.* I did.

Q. 78. So then the entire four cars, as I understand it, were on the north siding? *A.* Yes.

Q. 79. Did you make any examination yourself of anything else except the cars which you put back on the rails? Did you examine the roadbed, tracks or anything else besides the wheels or trucks of the car? *A.* I just looked to see if the wheel was engaging to take the rail, and it was.

Q. 80. Did you find that the rails from the examination you made as to whether or not they would take the trucks, what do you say the condition of the rails was? *A.* All right.

Cross Examination by Mr. O'Brien.

[Mr. O'Brien draws plan on blackboard.]

XQ. 81. That is supposed to be the main line, that is the siding,—do you recognize that? *A.* I do, yes.

XQ. 82. Now as I understand it, when you got there you found this particular car—this ought to be that way more —[drawing on blackboard]. *A.* Yes.

XQ. 83. What is the distance, do you know, between those two tracks? *A.* I don't know.

XQ. 84. Maybe I can find it from the plan [looking at plan]. About 8 or 9 feet. Well, as I understand it, you found the head trucks going toward Lynn of the fourth car up here on this track, is that right? *A.* Yes.

XQ. 85. And you found the rear trucks over here [indicating on plan]? As I understand it, you found them in this fashion [drawing sketch on blackboard]. That is the rear trucks of the forward car and the head end of the third car, is that right? *A.* That is the position I found them in.

XQ. 86. This is the General Electric over here, is that right? *A.* Yes.

XQ. 87. So that the southern wheels of both sets of trucks were between the rails of the north siding? *A.* That is right.

XQ. 88. And the northern wheels of those two trucks were to the north of the north rail of that siding, is that right? *A.* That is right.

XQ. 89. Does that pretty fairly indicate just how they were? These wheels in between the rails—this truck and this front truck here—this outside to the General Electric —as I undrestand it, this rear truck was on the rail, is that right? *A.* That is right.

XQ. 90. Have I fairly well portrayed that,—that is, in a rough way?

Mr. Garland. When you say "rear truck", you mean the truck nearest the engine?

Mr. O'Brien. Yes.

XQ. 91. Is that as the cars were located? *A.* That is the way I found them, yes.

XQ. 92. You have the rear trucks of the fourth car straddling the north-bound railing of the north siding, and you also have the rear trucks or the front trucks going toward Lynn on the third car straddling the north rail of the north siding, is that right? *A.* Yes.

XQ. 93. Mr. Garland asked you about flanges. Will you describe to the jury what a flange is? *A.* A flange is the outer rim a wheel, it is a guide to keep it on the rail.

XQ. 94. The purpose of a flange is to keep the wheel on the rail? *A.* Yes, sir.

XQ. 95. Assuming this is the rail [indicating on blackboard] and the wheel is out here? *A.* Yes.

XQ. 96. The base of the wheel is here? *A.* Yes.

XQ. 97. This flange runs along so that wheel won't slide off the rail. How long are the flanges? What is the dimen-

sion of a flange usually? *A.* I don't know for sure. I would say about one inch, one inch and a half, an inch and a half.

XQ. 98. In answer to Mr. Garland, you said you examined the flanges of these two cars which were in the derailment? *A.* The three trucks, yes, sir.

XQ. 99. Three trucks, by that you mean the west truck of the fourth car, the truck nearest the engine, is that right? *A.* Yes, sir.

XQ. 100. And you examined the head truck of the next car, that is, the truck that was near that, is that right? Are these the trucks which you examined [indicating on sketch on blackboard]? *A.* Those two right there [indicating on sketch] and that one on the main line.

XQ. 101. Those two and that one there? *A.* Yes, sir.

XQ. 102. Did you examine each wheel of those trucks? *A.* Well, I looked at each wheel as I walked by.

XQ. 103. As you walked by. Did you make any notes of your observations about the entire proceeding? *A.* Just my own notes.

XQ. 104. Were they written notes? Have you them with you? *A.* I have them in my desk, yes, sir.

XQ. 105. You didn't bring them with you? *A.* No, sir.

XQ. 106. Didn't you know you were going to testify today? *A.* I did.

XQ. 107. When did you look at your notes last? *A.* I haven't looked at those notes for some time. I don't know how long.

XQ. 108. Didn't you look at them before coming here to testify? *A.* No, sir.

XQ. 109. Do you know the car numbers of those cars? *A.* I don't offhand, no, sir.

XQ. 110. Did you make a note of that? *A.* That was in my record.

XQ. 111. You have not your record with you of the car number? *A.* No, sir.

XQ. 112. You have no records with you? *A.* No, sir.

XQ. 113. So you are testifying now from what you remember back in July? *A.* I am trying to, yes, sir.

XQ. 114. Without refreshing your recollection, is that right? *A.* Absolutely.

XQ 115. Now did you observe the flanges of the fourth car? *A.* The fourth car from the engine?

XQ. 116. Yes, sir. *A.* I walked around and looked at them to see if they were safe to run.

XQ. 117. You characterized them as dull, is that right? *A.* I did, yes, sir.

XQ. 118. What do you mean by a dull flange? *A.* A dull flange is a safe flange.

XQ. 119. What do you mean by a safe flange? *A.* A dull flange.

XQ. 120. Exactly, but as far as "safe" is concerned, with reference to a wheel, do you mean that a dull flange will not derail? *A.* Yes, sir.

XQ. 121. That is one purpose of it? *A.* Yes.

XQ. 122. A dull flange will not pry open a switch point? *A.* Yes, sir.

XQ. 123. Do you have sharp flanges? *A.* We have, yes, sir.

XQ. 124. Did you see any sharp flanges on any one of those three trucks? *A.* I did not.

XQ. 125. You examined eight wheels? *A.* I did, yes, sir.

XQ. 126. And you found no sharp flanges? *A.* That is right.

XQ. 127. Was that merely a casual inspection as you walked around or did you examine each wheel? *A.* I did, yes, sir.

XQ. 128. Casually as you walked around you said a moment ago that you walked around, you were just walking around? *A.* I did walk around, yes, sir.

XQ. 129. A sharp flange would pry open a switch point and derail a car, wouldn't it? *A.* I presume it would.

XQ. 130. Yes, it would. And so that was why you looked to ascertain whether all of these flanges were dull, is that right? *A.* I looked to see if they were safe to move, yes.

XQ. 131. Do you know what kind of a frog the frog was between the north siding and the west-bound rail? *A.* I do not, no, sir.

XQ. 132. Are you familiar with frogs? *A.* I am not, no, sir.

XQ. 133. Frogs are operated by flanges, are they not? Do you know that? *A.* The flange of a wheel?

XQ. 134. Yes. *A.* I know the flange goes over them, yes.

XQ. 135. You know a spring frog is operated by the flange of the wheel, don't you? *A.* I do know that, yes, sir.

XQ. 136. The flange of the wheel has got to be small enough to go into the frog in order to spring the frog, hasn't it? *A.* Yes.

XQ. 137. That is right. So if you get a flat wheel with an extremely dull flange your frog is not operated, is it? *A.* I don't know, sir.

XQ. 138. You don't know that? *A.* No, sir.

XQ. 139. Would you say that all of these flanges were runable? *A.* All that I looked at?

XQ. 140. Yes. *A.* Yes.

XQ. 141. And that is what you were concerned with? *A.* Yes.

XQ. 142. As to whether they were runable or not? *A.* As to whether they were safe, yes, sir.

XQ. 143. Safe? *A.* Yes, sir.

XQ. 144. That they were holding the rail? *A.* Yes, sir.

XQ. 145. That they would do what they were required to do with reference to frogs? *A.* Yes.

XQ. 146. And you say you don't know whether that was a spring frog or not? *A.* I didn't look at that, no, sir.

XQ. 147. You do know what a spring frog is? *A.* I have heard of them only.

XQ. 148. You only heard of them? *A.* I have seen them but I have never seen them in operation.

XQ. 149. You have never seen them in operation? *A.* No, sir.

XQ. 150. Have you ever seen any frogs of the Boston and Maine Railroad where they have derailed cars? *A.* I have not, no, sir.

XQ. 151. But this accident happened right near this frog?

Mr. Garland. I object to it. He didn't see the frog.

Mr. O'Brien. I will withdraw it.

The Court. Strike it out.

XQ. 152. You found these cars derailed near this frog, didn't you, near the frog?

Mr. Garland. What do you mean by that?

The Witness. I was quite a ways up the two spur tracks and I didn't see no frog, no, sir.

XQ. 153. You knew where the frog was? *A.* Looking back, I couldn't tell you, no, sir.

XQ. 154. You had to move the trucks of the last car from the main line over onto this track here [indicating on board] on the north siding? *A.* I didn't see no frog then.

XQ. 155. Didn't you have to do that? *A.* Yes.

XQ. 156. You mean to tell this jury that you don't know where the frog was with reference to that movement? *A.* I don't, no, sir.

XQ. 157. Was it east of that movement or west of that movement? *A.* The frog must be west of that movement.

XQ. 158. West of the movement towards Boston, wasn't it? *A.* It was, yes.

XQ. 159. So these cars that you found derailed must have passed over that frog? *A.* Yes, sir.

Mr. O'Brien. That is all.

Mr. Garland. That is all.

JOHN F. SWEENEY (Sworn).

Direct Examination by Mr. GARLAND.

Q. 1. What is your full name? *A.* John F. Sweeney.

Q. 2. And where do you live? *A.* 363 Lafayette Street, Salem.

Q. 3. How long have you lived in Salem? *A.* Seventeen years.

Q. 4. What is your business or occupation? *A.* I am trainmaster for the Boston and Maine Railroad.

Q. 5. Where are you located, where is your office? *A.* My headquarters are in Salem.

Q. 6. On the morning of this accident, did you go down there where the four cars were located, to the scene of the accident in which Mr. Jesionowski was involved? *A.* Yes, sir, I did.

Q. 7. About what time did you get down there that morning? *A.* About 6:20, I would say.

Q. 8. Will you tell us what you saw and what you did down there? *A.* Well, before I reached the accident I was telephoned to by the tower man at the Lynn tower, telling me—

Mr. Garland. No.

Q. 9. As the result of a telephone call, did you go down there? *A.* I went down as the result of a telephone call.

Q. 10. When you got down there what examination did you make, what did you see? *A.* Immediately on getting there I talked to the conductor—

Q. 11. Don't tell us what the conductor said, but as a result of any talk, what did you do? *A.* I made arrangements to send traffic on a single track, I began running trains on one track in both directions on the east-bound track because the west-bound track was occupied by the rear truck of this derailed car.

Q. 12. What effect did that have on trains moving on the other track? *A.* We had to move trains in both directions on one track.

Q. 13. Was that to prevent a collision between the trains on the east-bound track? *A.* It was to keep traffic moving, yes, sir.

Q. 14. Go ahead. *A.* Well, when I got there I found that the Lynn Fire Department was there with jacks and they were in the process of jacking up the second car from the rear end under which the body was, and the body was removed shortly after I got there and taken by the Lynn Fire and Police Departments.

Q. 15. Tell us what, if anything you observed about the position of these various cars. *A.* The various cars were as outlined by the previous man. The rear truck of what I will call the leading car backing up was on the west-bound main track.

Q. 16. The west-bound main track, that is the track next to what has been called the north siding? *A.* That is right.

Q. 17. The last car—did you notice where the lead trucks of that last car were when you got there, the fourth car from the engine? *A.* On the fourth car the leading truck was on the west-bound main track and was not derailed.

Q. 18. The leading truck was not derailed? *A.* That is right.

Q. 19. Now the forward trucks of that car, that is, the truck near the engine? *A.* I call those the trailing trucks and those trucks were derailed.

Q. 20. [Indicating on blackboard.] Mr. Sweeney, Mr. O'Brien has drawn a track here. *A.* That is the west-bound main.

Mr. O'Brien. You do recognize it?

The Witness. Yes, that is fine.

Q. 21. Use your imagination— *A.* That is right, this was the truck that was not derailed.

Q. 22. And those are the trucks on the west-bound main track which you say were not derailed? *A.* That is right.

Q. 23. Now the trucks on the forward end of that car,—those would be the trucks near the engine,—were they derailed as indicated in this drawing here? *A.* They were.

Q. 24. That is, the two wheels on the side I am pointing to [on the blackboard] were between the rails of that— *A.* Siding, that is right.

Q. 25. And the other two wheels of that truck were on the General Electric side of the rail? *A.* That is right.

Q. 26. Then tell us about the position of the next car to the last one. *A.* The leading truck of that car was also derailed as outlined on that board.

Q. 27. In other words, those four wheels constituting the trucks we are talking about were derailed and they were in the position— *A.* As shown on the blackboard, yes.

Q. 28. Now then, where were the next set of trucks of that third car, the trucks nearest to the engine? *A.* On the rails of the north-bound siding.

Q. 29. What was the condition of the trucks of the second car from the locomotive, that is, the next car to this third one? *A.* All the other trucks were on the rails on the north siding.

Q. 30. They were all on the rail? *A.* That is right.

Q. 31. And when you saw the last car where you say the lead trucks were on the west-bound main line and the next trucks were derailed, was the body of the car at a slant across the track? *A.* It was.

Q. 32. What kind of frog was the frog—I think the evidence shows it was 75 feet on the easterly side of this switch which is marked B on the plan here—what kind of frog was that? *A.* I have heard it called a spring frog.

Q. 33. What kind of frogs are there besides spring

frogs,—is there a rigid frog? *A.* There are rigid frogs without springs.

Q. 34. What is the function of a frog, whether it is a rigid or a spring frog, what is the purpose of a frog? *A.* A frog is to be sure that your wheels will take the rails all right and that they will not be derailed.

Q. 35. In other words, a frog operates in conjunction with the switch point, does it? *A.* No, it does not.

Mr. O'Brien. Just a minute. May that go out?

The Court. He says it does not.

Q. 36. Will you tell us exactly how it operates. *A.* The frog is located some distance behind the switch point, behind the heel of the switch.

Q. 37. And what is the difference between a rigid frog and a spring frog? *A.* Well, I am not familiar enough with engineering matters to discuss that.

Q. 38. Do you know the difference in the operation? *A.* I do, yes.

Q. 39. That is all I am asking, the difference in operation between a spring frog and a rigid frog. *A.* A rigid frog is not sprung by the wheels, by the flanges, and the spring frog is.

Q. 40. Are you familiar enough with the operation of a spring frog to know just how the flange of the wheel operates on a spring frog? *A.* Yes, I think I am.

Q. 41. Will you tell us about it? *A.* Well, as the wheels approach the frog, they push it over, there is a guard rail there to keep the wheels from being derailed.

Q. 42. A guard rail? *A.* Yes.

Q. 43. Can you draw a plan of it? *A.* No, I think you better; I am no engineering man. I could not even draw an apple.

Q. 44. Do you know about the dimensions of this frog, how long it is, or how wide? *A.* I have a mental picture of

it, but I would not want to go into any details in discussing it. I am not an engineering man. I imagine the engineering men have all those dimensions.

Q. 45. Did you notice the condition of the ties sometimes called the sleepers on the north siding between the frog and the switch point which has been marked "B" on this plan, Exhibit 1? Did you see any marks? *A.* Yes, I did see some flange marks on the ties.

Q. 46. And can you tell us the location of those flange marks having in mind the switch point and the frog, where they began with reference to the frog? *A.* Well, I would say probably somewhere six to eight feet before they came onto the frog, before they reached the point of the frog.

Q. 47. That is, the flange mark of the wheels on the ties began as I understand you, about 6 to 8 feet before you came to the frog? *A.* That is right.

Q. 48. And do you remember how far from that point back towards the switch you observed the flange marks on the ties or sleepers? *A.* Back towards the switch points they only began 6 or 8 feet away from the frog.

Q. 49. On the west of the frog? *A.* That is right, to the west of the frog.

Q. 50. They began 6 or 8 feet west of the frog, and did they continue beyond the frog? *A.* Yes, they did. They sort of ripped up beyond the frog and the cars became derailed.

Q. 51. Did you while you were down there, test the switch itself to see how it operated? *A.* Yes, I did.

Q. 52. Tell us what test for operation you made and what you found to be the condition of that switch. *A.* I operated the switch back and fourth and found that it operated perfectly.

Q. 53. Was this a hand switch? *A.* It was a hand-thrown switch.

Q. 54. You say you operated it back and forth? *A.* That is right.

Q. 55. By that you mean you operated it so if you were coming from the main line running back onto the north siding, you could see whether or not the switch operated properly for that movement? *A.* That is right.

Q. 56. Then did you operate the switch to see what its condition would be if a train was backing but not going on the north siding? *A.* Yes, I operated it both ways.

Q. 57. And what did you find from your operation of that switch in both ways? *A.* I found that it operated perfectly.

Q. 58. Now did you make any other examination of anything while you were down there besides the switch? *A.* Nothing in particular, only a general observation.

Q. 59. Did you observe the condition of the roadbed and the track? *A.* Yes, it seemed all right.

Q. 60. From such examination as you made by looking at it, the track and the roadbed you say seemed to be all right? *A.* Yes, sir.

Q. 61. If the frog had anything to do with the derailment would you expect the first truck that hit the frog to be derailed?

Mr. O'Brien. I object.

The Court. Unless he is an expert.

Q. 62. Well, let me ask you this. Have you seen derailments before? *A.* Yes, hundreds of them.

Q. 63. You are fairly familiar, are you, with derailments? *A.* Yes, I attend almost every derailment in my territory.

Q. 64. And you have examined them?

The Court. Such as we have here?

The Witness. I attend them all and give certain instructions—

The Court. Answer my question. Have you examined derailments of the exact nature that has been described here?

The Witness. Well, your Honor, it is seldom that you find two derailments of the same kind. I have never seen derailments that were ~~quite similar~~ to this one before.

The Court. The result of derailments are not at all similar, are they?

The Witness. They are not.

The Court. It is hard to answer questions as to what you might exactly expect in derailments. They are varied.

Q. 65. If a frog derails a car or a truck, is the first truck that crosses the frog derailed?

The Court. Don't lead him. If a derailment is caused by a frog, what is the effect on the cars, if any, if you know?

The Witness. I have never seen a derailment caused by a frog.

The Court. So I dare say you cannot qualify him.

Mr. Garland. I won't ask any further.

Q. 66. This is the first and only derailment you have seen—

Mr. O'Brien. Caused by a frog.

Mr. Garland. No, no—in which it is claimed—

The Court. Start all over again.

Mr. Garland. Don't you want the question in?

The Court. That was manna from heaven. I dare say you withdraw that question.

Mr. Garland. I withdraw it.

The Court. Withdraw it and start all over again.

Q. 67. Did you ever hear of a derailment caused by a spring frog such as this one?

Mr. O'Brien. I object to that, as to what he heard.

Q. 68. Did you ever know of one—

The Court. Did you ever see one?

The Witness. I have never seen nor heard of a derailment caused by a spring frog.

The Court. Strike it out.

Q. 69. How many derailments have you visited? *A.* A couple hundred.

Q. 70. How many derailments are you familiar with of any kind? *A.* Hundreds. I wouldn't say how many hundred.

Q. 71. And you have never seen one caused by a spring frog? *A.* I have never known of one ever being caused by a spring frog.

Cross Examination by Mr. O'Brien.

XQ. 72. You know how a spring frog operates? *A.* I do, yes, sir, fairly well.

XQ. 73. And supposing the flange does not spring the frog, what happens to the wheels? *A.* That I wouldn't know.

XQ. 74. Now, now, now— *A.* Nothing could happen. There is a guard rail there to protect it.

XQ. 75. All right, but if it does not go into that slot? *A.* If it does not, then the guard is there to protect it.

XQ. 76. It rides the point of the frog? *A.* No.

XQ. 77. Where does it go if it does not hit the rail? *A.* If it does not hit the rail?

XQ. 78. Yes. *A.* There is a guard there.

XQ. 79. How long is the guard rail? *A.* I don't know in inches or feet, but I know it is long enough.

XQ. 80. It is no more than three feet? *A.* It is long enough to guide the wheel in there.

XQ. 81. But it cannot guide it in there unless the flange springs that frog that has to be sprung? *A.* Sure.

XQ. 82. You have to be close up? *A.* Yes.

XQ. 83. And the flange goes in like that, doesn't it [indi-

cating with a piece of blotting paper on the witness stand]? A. Yes.

XQ. 84. It springs it out when the flange goes through and snaps it back again? A. That is right.

XQ. 85. If the flange does not go in, if it is a dull flange— A. A dull flange will go in there where a sharp one won't.

XQ. 86. I am talking about a flat one. A. I never heard of a flat flange, but I have heard of a flat wheel.

XQ. 87. I am talking about a flat wheel. It won't separate them so you can get in there, will it? A. I don't get your question; you are talking in riddles.

XQ. 88. I will ask you not to characterize what I am talking about. Let's assume this point of the frog butts up against the rail? A. Yes, sir.

XQ. 89. What separates that from the rail? A. The flange.

XQ. 90. The flange of the wheel pushes it out that way [indicating on blackboard]? A. Yes, sir.

XQ. 91. Then it passes along here [indicating]? A. That is right.

XQ. 92. When it passes that slaps up against the rail? A. Sure.

XQ. 93. Supposing that flange does not separate that, then what happens? A. I wouldn't know.

XQ. 94. You don't know? A. No.

XQ. 95. Can you draw on your imagination at all to think what might happen? A. Several things might happen.

XQ. 96. And one of them might be a derailment? A. Could be.

XQ. 97. Yes, could be. What is your experience on the railroad? A. 38 years.

XQ. 98. And in what capacity? A. Well, I have been 17 years train master, 11 years yard master and the balance of the time in various capacities.

XQ. 99. Have you ever worked as a brakeman? *A.* No, sir.

Mr. O'Brien. That is all.

Mr. Garland. May we have a recess?

The Court. Yes, we will have a short recess.

[Recess.]

The Court. May I see counsel a moment, please?

[Conference at the bench, not reported.]

The Court. I want to see the members of the jury and the foreman singly; will the foreman come up here first and then the others right along in a line?

[Judge interviews each member of the jury.

[Conference at the bench, not reported.]

The Court [addressing the jury]. Mr. Foreman and gentlemen: it was reported to me that on some case being tried in the building at the present time—and there are several cases being tried here before others of my associates—that someone spoke to a juror about a case on which he happened to be sitting so it is my duty to make some inquiry with respect to it. Now keep in your mind that never at any time was there any question that either of these two honorable gentlemen [indicating Mr. Garland and Mr. O'Brien] or any of their agents spoke to anybody. It is my duty to make inquiries about these matters. It appears, evidently, that it was not a juror on the case being tried here and I eliminate these two gentlemen from any participation.

Mr. Garland. And also from ever asking any question about it.

The Court. They did not bring it to my attention. Now we will go on. Don't talk to anybody about this case,—with outsiders,—and don't even discuss it—as best you can within the limits of human nature—with your fellow jurors until you hear all the evidence.

FRANCIS T. FLYNN (Sworn).

Direct Examination by Mr. GARLAND.

Q. 1. What is your full name? *A.* Francis T. Flynn.

Q. 2. Mr. Flynn, where do you live? *A.* 17 Channing Road, Belmont.

Q. 3. How long have you lived in Belmont? *A.* Sixteen years.

Q. 4. What is your work or job? *A.* I am assistant division engineer of the Boston and Maine Railroad.

Q. 5. How long have you been employed by the Boston and Maine Railroad? *A.* 26 years.

Q. 6. Will you tell the court and jury in what different capacities you have worked for the Boston and Maine Railroad during that time? *A.* Well, I started in the engineering department as a draftsman, then I was transit man, then I became assistant engineer and then I was promoted to assistant division engineer.

Q. 7. And you are at the present time what? *A.* Assistant division engineer.

Q. 8. Of what division? *A.* Of the terminal division.

Q. 9. Just what are your duties as assistant division engineer? *A.* Why, I am in charge with the division engineer of maintenance and construction of tracks, bridges, buildings and other structures.

Q. 10. And does the place down where this accident happened in Lynn come within your jurisdiction? *A.* Yes.

Q. 11. You did not see the accident? *A.* No, I did not.

Q. 12. But you got down there on the morning of the accident, did you? *A.* Yes, I did.

Q. 13. About what time did you arrive at the scene of the accident? *A.* About 7:30.

Q. 14. Did you go alone? *A.* Yes, I was called at home, so I went directly down.

Q. 15. And will you tell the court and jury, when you got down there just what you saw and what examination, if any, you made; what the conditions were? A. When I arrived there, there were four cars; the lead trucks of the first car towards Lynn were on what we call the west-bound tracks, the rear trucks of that same car were on the inside of the north rail of the north siding and the first trucks of the next car were also derailed inside the south rail.

Q. 16. Of the north siding? A. Of the north siding. And the other wheels were on the outside of the north rail and the rear trucks of that same car were on the rail of the north siding and the two last cars were on the rail of the north siding.

Q. 17. Now this track that I am pointing to you [indicating on Exhibit 1], that is the north siding, there are four tracks which appear on this plan and the lowest track is the north siding? A. That is right.

Q. 18. Then the next track to that is the main west-bound track? A. Yes.

Q. 19. And that track on which trains run going from Salem and Lynn on the way to Boston? A. That is right.

Q. 20. And then the next track on the top of the plan is the main east-bound track? A. That is right.

Q. 21. That is the track on which the trains from Boston run to Lynn, Salem and Portsmouth? A. That is right.

Q. 22. What is that next track on the top? A. That is what we call the south siding.

Q. 23. That is the south siding, and the one at the bottom of the plan is the one that we refer to as the north siding? A. Yes, the north siding.

Q. 24. Now as I understand it, you found the truck of the lead car, that is, the fourth car from the engine, on the rail of the west-bound main track? A. That is right.

Q. 25. And then the trucks at the other end of that car, that is, the trucks nearer the locomotives you found de-

railed between the rails of the north siding? A. That is right.

Q. 26. Were they as Mr. O'Brien has indicated in the drawing here, one set between the rails of the north siding? A. That is right.

Q. 27. And the other set outside the rails and towards the General Electric plant? A. That is right.

Q. 28. And then were the trucks of the third car from the locomotive which was next to the fourth, that is, the trucks close to this last car, derailed on the north siding as indicated in this sketch by Mr. O'Brien? A. That is right.

Q. 29. Two wheels between the rails and two wheels on the other side of the same truck were outside the rail of the north siding towards the General Electric plant? A. That is right.

Q. 30. Then you found the second car from the locomotive and also the first car from the locomotive both on the rails on the north siding? A. That is right.

Q. 31. While you were down there what else did you do besides make the observations you have told us about? A. Well, our usual manner—

Q. 32. No, what did you do? A. I saw the front wheels of the first car on the main line track.

Q. 33. That is the one you testified about that was on the main line track? A. That is right. I didn't know whether the switch point was open to cause them—

Mr. O'Brien. No.

Q. 34. Never mind that. As a result of seeing them there in the course of your investigation where next did you go? A. I went to the switch stand.

Q. 35. The switch stand which is indicated on this plan near the B? A. That is right.

Q. 36. You went there, did you? A. Yes.

Q. 37. What kind of switch is this? A. It is called a 17-B high switch.

Q. 38. Is it a hand switch? A. It is a hand switch.

Q. 39. Operated by hand? A. It is operated by a lever, by hand.

Q. 40. What did you do when you went to that switch? A. I looked to see how the switch points were, whether they were close up against the stock rail and then I saw that they were, while there, open for the siding; then I took the switch stand and threw it so I could open up the line, open up the main line, to see whether the switch points fitted close to the stock rail and I found out in both cases that they did.

Q. 41. In other words, when you first went there—you say that the point, the switch points, you understand I am talking about the switch points 15 feet long— A. Yes, they are 15 feet long.

Q. 42. From the heel of the switch point to the short tip? A. Is 15 feet.

Q. 43. So you made an examination to see whether or not the sharp end, the tip of the switch point, was close against the main line track? A. That is right.

Q. 44. And you say it was? A. Yes, it was. Then I tried it on the side track to find out if it was close there, so I threw the switch back to its original location and it fitted up again. I then went down the other end to see how far down the derailment went.

Q. 45. How far the derailment went? A. That is right.

Q. 46. When you threw the switch back and forth, how did you find the switch worked? A. It worked all right.

Q. 47. Was there anything wrong with it while you worked it? A. No, sir.

Q. 48. You say you went back to see where the derailment started? A. That is right.

Q. 49. And what did you find? A. I found that the front

wheels evidently went down on the main line track, of the first car.

Q. 50. That is, they would be the lead wheels? *A.* The lead wheels.

Q. 51. Those went down on the main line track? *A.* That is right. The rear wheels went down on the north siding.

Q. 52. By "rear wheels", you mean the wheels indicated on this sketch made by Mr. O'Brien? *A.* That is right.

Q. 53. Then you found, as you said, the trucks on the other end of that car, the trucks nearest the engine were derailed on this side as indicated in this sketch? *A.* That is right.

Q. 54. What if anything did you observe about marks on the ties or sleepers? *A.* After going down to that end, then I tried to determine what was the cause—

Mr. O'Brien. No.

Q. 55. You don't need to tell us what you thought the cause was, what did you find, what physical marks? *A.* I started then back at the switch point and looked down on the rails on the main line and I could not find any derailment, any marks, so then I went down on the side track and on the rail nearest the General Electric—

Q. 56. That is to say, you mean on the siding, this siding towards the General Electric? *A.* That is right.

Q. 57. What did you find, if anything? *A.* I found wheel marks on the top of the rail at a distance of 69 feet.

Q. 58. From what? *A.* From the switch point.

Q. 59. In other words, at a distance of 69 feet from the point of the switch point, marked B, back there, you found what? *A.* I found wheel marks.

Q. 60. Now tell us where you found them. *A.* They were 69 feet from the switch point.

Q. 61. That would be 69 feet going towards Lynn from

that switch point you say you found the marks? A. That is right.

Q. 62. What did the marks look like—where did you find them, were they on the wood or on the rail? A. They were on the rail.

Q. 63. What kind of marks were they? A. They were dents, traces of a wheel that had cut into the top.

The Court. What did they appear to be?

Q. 64. What did they appear to be,—those marks that you saw? A. Wheel tracks, caused by the wheel of a car going over from the flange rail over to the other side of the rail.

Q. 65. Where would that be near the north siding? Where did you find those marks, on which rail? A. I found them on the rail nearest the General Electric Company away down this side of the frog.

Q. 66. Down this side of the frog, that is, on the switch point side of the frog? A. On the switch point side of the frog.

Q. 67. And did you trace those marks along to see how far they extended easterly of the frog? A. Yes, I did.

Q. 68. How far did they extend? A. From that point where the last marks showed on the ground and the top of the ties was 170 feet.

Q. 69. From what point? A. From where I first found a trace of the wheel on the ball of the rail.

Q. 70. You found the first marks 69 feet from the— A. From the switch point and then they continued 170 feet.

Q. 71. You found the first mark 69 feet from the switch point and then they continued 170 feet beyond that? A. That is right.

Q. 72. What were those marks throughout that length of 170 feet? A. They were wheel marks both inside and outside the rail, they had cut along the top of the ties and had ground into the earth.

Q. 73. Had Mr. Jesionowski been moved before you got there? A. Yes, he had.

Q. 74. Did you make any examination to see if there were any blood stains? A. Yes, I did.

Q. 75. Where did you find them? A. Blood stains were found on the ground near—well, the distance was 118 feet from where I found the first wheel marks, or 118 feet plus 69 feet from the switch point.

Q. 76. That is 187 feet, is it? A. That is right.

Q. 77. And where were they, on which track or near which track? A. They were on the north siding.

Q. 78. They were on the north siding. That is to say, those marks you found 187 feet easterly of the switch point and near the north siding? A. That is right.

Q. 79. Where were they, were they between the rails or outside the rails? A. Some were in between and some were outside.

Q. 80. And were they outside between the main line track and the siding or between the siding and the General Electric? A. They were between the siding and the General Electric.

Q. 81. Now what else, if anything, did you do by way of examination? A. I got hold of the wreck master.

Q. 82. That was Mr. Noel? A. Yes, and then I attempted to find out what way he was going to put the trucks back on the rail so that we could get the use of the west-bound line and put it back in traffic because we had it blocked with the first car.

Q. 83. Did you make any other inspection or examination? A. I made an inspection of what damage there was to the track.

Q. 84. What damage did you find to the track, and where was it? A. There was damage to the frog because the bolt of the frog was clipped off and there was damage

to around 40 ties where the wheels had cut into them so that they had to be removed.

Q. 85. What kind of frog was this? *A.* A spring frog.

Q. 86. Will you tell us something about the function or uses of a spring frog? *A.* Well, a spring frog is usually put on a main line where there is a lot of traffic and on a siding where there isn't too much traffic because there isn't much operation and the frog is always set so that it will ride on the main line.

Q. 87. On the main line? *A.* That is right. Then when you use the siding and the train goes down there is a guard rail on one side and the frog goes out in a little groove or arm and the wheels ride on that and the train goes down the siding.

The Court. We will adjourn until tomorrow at ten o'clock.

[Hearing adjourned until Wednesday, May 2, 1945, at 10 o'clock A.M.]

SECOND DAY.

BOSTON, MASSACHUSETTS, May 2, 1945.

FRANCIS T. FLYNN, Resumed.

Direct Examination by MR. GARLAND, *continued.*

Q. 88. At adjournment yesterday, Mr. Flynn, I was asking you about this frog and on the sketch that is put on here by my brother showing the frog, that is the frog point? *A.* That is the frog.

Q. 89. The evidence shows that that is 75 feet from the point of the switch. Now using this sketch on the blackboard, will you explain to us a little more fully just what the function of the frog is in connection with the main line and the siding?

Q. 90. Do you need to step down? *A.* [Witness goes to

blackboard.] The purpose of the frog is to take the car from running on one track and divert it through the switch onto another track. At this particular point the cars go down here [indicating on sketch] and run through onto the side track by running through that frog. Now this is a rigid frog which is right here. When the wheels go down here [indicating on sketch], they are guided by that guard rail over here and those wheels through the guard rail pull this part of the spring frog over and let the flange go through here.

Mr. O'Brien. That is a rigid frog.

The Witness. This is a rigid frog. A rigid frog has no movable points. This part here is where the wheel is guided by this guard rail and moves this way. This is movable and is set on that side. This is movable two inches but the train wheel which is about 1⅜ inches, goes through there and moves it until it gets beyond the point and then it runs on that point.

Q. 91. Is the guard rail on the spur track or siding opposite the frog? *A.* Yes, exactly opposite.

Q. 92. And in this particular case what was the length of the guard rail? *A.* 9 feet.

Q. 93. And does it run along parallel with the rail? *A.* Yes. It is 1⅞ths inches from this side of what we call the gauge side of the rail over to the next point of the guard rail.

Q. 94. [Indicating on jury rail and with a pointer.] Would you say, assuming that the jury rail is the track and the pointer the guard rail,—what would you say that is [indicating space on jury rail]? *A.* 1⅞ths inches.

Q. 95. 1⅞ths inches between the guard rail and the rail of the track, is that right? *A.* Yes.

Q. 96. And the flange of the wheel that is on that rail passes, does it, between the guard rail and the rail of the track? *A.* That is right.

Q. 97. Now what is the depth of the flange? *A.* It is supposed to be an inch.

Q. 98. And then what is the width? *A.* An inch below the base of the top rail.

A. 99. The flange goes down an inch below the top of the rail? *A.* That is right.

Q. 100. What is the width of that flange where it engages the flat part of this wheel? *A.* 1⅜ inches.

Q. 101. And that guard rail—perhaps you will draw on this blackboard where that guard rail is on the spur track opposite the frog. *A.* [Witness draws on blackboard.]

Q. 102. And what do you say is the length of the guard rail at this particular point [indicating on sketch just drawn]? *A.* Nine feet.

Q. 103. Does the guard rail set up above the ties the same level with the top of the track itself? *A.* Yes, it is the same height as the top rail.

Q. 104. Is the top of the guard rail constructed like the top of the rail of the track?

Mr. O'Brien. Of course, my brother is leading but I don't know that I want to interfere a great deal.

Mr. Garland. If there is any question about it I won't ask it.

Q. 105. Will you describe the construction of the guard rail and its simliarity or dissimilarity, whatever it may be, to the rail of the track? *A.* The rail of the track—do you want me to draw it?

Q. 106. Yes.

[Witness draws on blackboard.]

Q. 107. Now is what you have drawn a cross-section of a guard rail? *A.* That is a cross-section of a guard rail.

Q. 108. Now mark the cross-section of the track "A". *A.* This is "A".

Q. 109. And the cross-section of the guard rail "B".

[Witness marks cross-section of guard rail "B."]

Q. 110. As I understand your testimony, the distance between the top of the rail of the track and the top of the guard rail is 1⅞ inches? A. That is right.

Q. 111. And the flange goes down, does it— A. That is right.

Q. 112. —about an inch? A. That is right.

Q. 113. And across the top of the flange, the rim of the wheel you stated was 1⅜ inches? A. 1⅜ inches.

Q. 114. Now when you went down there on the morning after the accident, did you examine the guard rail to see what its condition was? A. Yes, I did.

Q. 115. What was its condition? A. Perfectly all right.

Q. 116. Now if a car was moving over a frog with the guard rail such as described and going not more than 5 or 10 miles an hour, and if there was anything wrong with the frog, could there be a derailment?

Mr. O'Brien. Just a minute.

The Court. I think you ought to qualify him with respect to frogs, his experience, the conditions and what not, before he answers that question.

Mr. Garland. Strike it out.

Q. 117. What is the purpose of that guard rail which you have drawn here and described? A. To hold the wheels over towards that rail.

Q. 118. To prevent what?

Mr. O'Brien. Just a minute.

The Court. Please don't lead him.

Q. 119. To hold the wheels where? A. Against that rail opposite that pointer.

Q. 120. That is to hold the wheel against that rail of the spur track? A. That is right, so as to protect the point of the frog.

Q. 121. What do you mean by protecting the point of the frog? A. So that it will go down on the siding.

Q. 122. What will go down on the siding? A. The car.

Q. 123. You said to protect the point of the frog so that the wheels of the car will go down on the siding? *A.* That is right.

Q. 124. Now yesterday you testified that you found upon examination certain marks on one side or the other of the frog, is that right? *A.* That is right.

Q. 125. What marks did you find? *A.* I found wheel marks.

Q. 126. Where? *A.* At 69 feet from the point of the switch.

Q. 127. That would be how far before you reached the frog going from the point of the switch? *A.* About 6½ feet.

Q. 128. About 6½ feet. Well, assuming my pointer [indicating on sketch] is pointing out 6½ feet, would it be about where I am indicating now? *A.* They were on the other rail.

Q. 129. Which rail do you mean? *A.* The further rail.

Q. 130. This one [indicating on sketch]? *A.* No, further across, that one there [indicating on sketch].

Q. 131. So you found, as I understand it, these marks such as you described on the rail of the siding which would be nearer to the General— *A.* Electric Company plant.

Q. 132. How far were they from the point of the switch? *A.* About 6½ feet.

Q. 133. I think you have already testified that they continued beyond that, going toward Lynn, going east you found, did you, the marks? *A.* I found the marks on the ties and some on the frog and also on the dirt, what we call the ballast of the track.

Q. 134. You spoke yesterday about a bolt or bolts on the frog being damaged, did you? *A.* Yes, they were the two front bolts on the joints.

Q. 135. Step down and point out where the bolts were on the frog. *A.* This is the joint in the frog [indicating on

the sketch], they were right back here on that side, there were two bolts there, and then we have a spring here and this spring bolt was dented.

Q. 136. Now what would cause the spring bolt to be dented as you found this one to be?

Mr. O'Brien. I object.

The Court. Unless you qualify him in some way to give an opinion with respect to dents and bolts and his experience with them, you must withdraw the question.

Mr. Garland. I withdraw the question.

Q. 137. Have you made examinations before with reference to marks where there was a derailment? *A.* Yes, I have.

Q. 138. Have you made examinations at points near the frog? *A.* Yes, I have.

Q. 139. How long have you had experience in making examinations of marks near frogs where there have been derailments? *A.* Since 1930.

Q. 140. Are you able to express an opinion from your experience in former investigations as to what would cause damage to a bolt which you have now described? *A.* Yes, I have.

Mr. O'Brien. I would like to know how many derailments.

The Court. Would you like to cross-examine him?

Mr. O'Brien. Yes.

Cross Examination by Mr. O'Brien.

XQ. 141. How many derailments with frogs have you had opportunity to observe? *A.* With frogs?

XQ. 142. Yes. *A.* I have had quite a few of them.

XQ. 143. There have been a number of frog derailments which you have had to do with? *A.* I have had a number of derailments.

XQ. 144. Do you get my question? How many derailments of frogs have you had an opportunity to examine? *A.* I should say half a dozen or so.

Mr. O'Brien. All right.

Redirect Examination by Mr. Garland.

Q. 145. Are you able to form an opinion as to the cause of the damage you found to the bolt of the frog? *A.* Yes.

Q. 146. What was it? *A.* That the wheels when they became derailed passed over and made the mark on the two forks over here and also continued on and showed the marks on that side where they passed over this bolt or spring and continued on to the marks beyond it.

Q. 147. Did I ask you yesterday, Mr. Flynn, if you found some blood stains or marks somewhere? *A.* Yes.

Q. 148. Where did you find them? First of all, how far from the point of the switch that we are talking about? *A.* 187 feet.

Q. 149. 187 feet, and where were they with reference to the main line or the spur track? *A.* They were on the rail inside and outside of the rail nearest the General Electric.

Q. 150. You say they were on the rail of the spur track nearest to the General Electric Company? *A.* That is right.

Q. 151. And that was 187 feet from the point of this switch? *A.* That is right.

Recross Examination by Mr. O'Brien.

XQ. 152. Do I understand you to say that the wheels of the car clipped those bolt heads? *A.* That is right.

XQ. 153. That is your opinion? *A.* Yes, sir.

XQ. 154. Did you see this drawing of mine here? *A.* No, I didn't.

XQ. 155. Did you hear testimony with reference to the

wheel marks there, 69½ feet from the switch point, as being between the track? A. That is right.

XQ. 156. On the north siding? A. That is right.

XQ. 157. Is that right? A. That is right.

XQ. 158. Do you want this jury to believe that these wheels of this truck here [indicating on sketch] made marks 69 feet—

Mr. Garland. 69½ feet,—marks on the rail.

XQ. 159. 69 feet was where you saw the marks on the rail? A. 69 feet from the switch point.

XQ. 160. 69½ feet, the wheel marks started on the roadbed on the tie? A. No, I didn't give that evidence.

XQ. 161. You say you know where the wheel marks began? A. Shortly outside of the frog.

XQ. 162. To the west of the frog? A. To the west?

XQ. 163. Yes. A. Yes, they were just a little to the west of the frog?

XQ. 164. Would you say they were 6 feet to the west of the frog? A. I should say the wheel marks were about 5 to 6 feet.

XQ. 165. Do you think during that 5 to 6 feet they were close enough to clip those bolts? A. They were.

XQ. 166. Is that right? A. Yes, sir.

XQ. 167. That is your opinion? A. Yes, sir.

XQ. 168. You did not see that frog before the accident? A. No.

XQ. 169. You don't know whether those bolts were clipped before the accident or not? A. Only that they—

XQ. 170. Answer the question. You don't know? A. That is my opinion, they were not.

XQ. 171. No, no, tell us, you don't know? A. No, I do not.

XQ. 172. That they were clipped before the accident? A. No, I don't.

XQ. 173. And this is merely your opinion based on experience with wrecks at frogs? A. That is right.

XQ. 174. And these frogs at which wrecks did occur, the frogs were known as spring frogs? *A.* No, there is only one through a spring frog.

XQ. 175. Only one? *A.* Yes, sir.

XQ. 176. The others were rigid frogs? *A.* The others were rigid frogs.

XQ. 177. Now you examined the switch points down here [indicating on sketch]? *A.* Yes, I did.

XQ. 178. Tell me about the switch points. They are 15 feet long? *A.* They are 15 feet long.

XQ. 179. And they are rails, are they not? *A.* They are rails tapered from the heel to the tip.

XQ. 180. And cut off in this fashion [indicating on blackboard]? *A.* Yes, sir.

XQ. 181. So you now have half a rail as it goes to meet a track? *A.* You have the full width at the end.

XQ. 182. It comes down as I have done it here [indicating on blackboard] on an angle, isn't that so? *A.* That is right.

XQ. 183. And that rail is a movable rail, that is, it moves from a fulcrum? *A.* Yes, held at that end.

XQ. 184. Going the other way? *A.* All right.

XQ. 185. That is a switch point and it moves in that fashion, isn't that so? *A.* That is right.

XQ. 186. Now the tip of this rail, is that one piece? *A.* It is all the same rail and it is reinforced on the web.

XQ. 187. This is one rail [indicating on sketch]? *A.* That is right.

XQ. 188. On the tip is it ever reinforced? *A.* No, not on the top. On the web of the rail, I will show you where the web is, right in here [indicating on sketch].

XQ. 189. Let me ask you, the tip of the rail, sometimes is that a separate piece from half way down the point to the end? *A.* No, we don't have those.

XQ. 190. Are there any replacements? *A.* No, they have to renew the whole switch point.

XQ. 191. Now at times the particular tip of the switch point that becomes worn? *A.* Yes.

XQ. 192. And that isn't a safe condition to operate in? *A.* No, it is not.

XQ. 193. Did you observe the condition of the tips of this rail? *A.* Yes, I did.

XQ. 194. What did you find with reference to that? *A.* They were all right.

XQ. 195. Absolutely all right, and no jagged tip? *A.* No jagged tip.

XQ. 196. And no pieces under it? *A.* No, pieces under it.

XQ. 197. If a sharp flange is inserted in one of those switches, it is possible for a sharp flange to throw that switch? *A.* If it is the least bit open.

XQ. 198. If it is the least bit open, you don't know what the condition of this switch was before this accident? *A.* No, I don't.

XQ. 199. Are you familiar with freight cars? *A.* To some extent.

XQ. 200. On a box car what is the equipment which the brakemen use in riding on the side of the car? *A.* They use the ladder that is on the side.

XQ. 201. And that is on the side of the car [Mr. O'Brien draws sketch on blackboard]. Let's say that this is the side of a car facing us. There is a ladder on that end? *A.* There is a ladder on that end.

XQ. 202. Now on the side of the car away from us there is a ladder on that end? *A.* There is a ladder on that end.

XQ. 203. And where there isn't any ladder? *A.* There is a sill with two hand holes on the side of the car.

XQ. 204. So if a brakeman is operating on this end of the car and gives a go-ahead motion and wants to go to the

other end of the car he steps into this sill step on the side of the car and takes hold of the handle? A. That is right.

XQ. 205. And gives his motion in this fashion? A. That is right.

XQ. 206. On the other hand if it happens to be a car in this fashion he makes his cut and then he climbs on the sill step and holds onto the ladder and gives his motion? A. There is a sill step on that ladder like the other one.

XQ. 207. He would get on the sill step and stand with his hands on the rung of the ladder and give his motion? A. That is right.

XQ. 208. So he would be at the end of the car? A. That is right.

XQ. 209. And ordinarily when they proceed to a point where they want to stop they give a stop motion? A. That is right.

XQ. 210. And step off, and if it is a switching operation walk to the switch? A. That is right.

XQ. 211. What did you observe about the air hose on those four cars? A. I didn't observe anything.

XQ. 212. Do you know anything about the operation of air brakes? A. Air brakes?

XQ. 213. Yes. A. To some extent, yes.

XQ. 214. Were you there when these cars were derailed? A. Yes, I was.

XQ. 215. Did you notice whether or not there was any separation of the cars? A. No, but between the leading car which is the one going towards Lynn and the next car the coupling was separated on that one, but the coupling was on all the others.

XQ. 216. You don't know what the condition of the air hose was? A. No.

XQ. 217. Whether it was separated or not? A. No, I don't.

XQ. 218. It is a fact that if there was a car on the switch

point the switch could not be operated by the hand lever? A. If the trucks were on it?

XQ. 219. That is what I mean. A. That is right.

XQ. 220. The release of air in the connections between the cars sets the brakes, isn't that so? A. That is right.

XQ. 221. So when you have air as it was testified we had in this case, the air brakes were on, that means from the engine to the end of the forward car they had a continuous stream of air flowing underneath the cars in pipes and between the cars in rubber hoses so there was a continuous flow of air, isn't that so? A. I imagine so.

XQ. 222. Isn't that the rule where air is on? And if those are disconnected or the pipe breaks there is a release of air from the pipe and the brake sets? A. That is right, unless they bleed them.

XQ. 223. Yes, but these cars were just cut off from the train? A. That is right.

XQ. 224. So the reservoirs in those particular cars were filled with air? A. I don't know how long an interval it was.

XQ. 225. But if they were filled with air as it was testified to by the engineer and there was a separation of this hose then there would be an automatic setting of all the brakes? A. That is right.

XQ. 226. Without any action on the part of the engineer? A. On the one car.

XQ. 227. Yes, and that in turn would set them on the others? A. That is right.

Redirect Examination by Mr. Garland.

Q. 228. My brother asked you if the trucks of the car were resting on the tip of the switch if you could move the switch, and you said No. A. No.

Mr. O'Brien. He didn't say tip. He said if the trucks were on the switch point.

Q. 229. But if the trucks were beyond the switch point

and the rear wheels were not resting on the heel of the switch, could you move the switch point? A. Yes.

Q. 230. If a wheel of a car was not derailed but passed normally over the frog, would it damage the bolts as you found those bolts damaged?

Mr. O'Brien. Just a minute. We have his qualification as to wrecks—

The Court. Now he is asking the question whether in the normal operation of a car over a frog, whether in a normal operation there would be any indentation or mark.

Mr. O'Brien. I would say the answer would be No, if it is normal.

Mr. Garland. If you admit it.

Mr. O'Brien. I suppose that is obvious.

The Court. All right, the answer is No.

JOHN F. BRADY (Sworn).

Direct Examination by MR. GARLAND.

Q. 1. What is your name? A. John F. Brady.

Q. 2. Mr. Brady, where do you live? A. 37 South Street Court, West Lynn.

Q. 3. How long have you lived in West Lynn? A. About 30 years.

Q. 4. What is your job or work? A. I am section foreman for the Boston and Maine Railroad.

Q. 5. How long have you been section foreman for the Boston and Maine Railroad? A. About 24 years.

Q. 6. And what are your duties as section foreman? A. Well, look after tracks and keep them in repair.

Q. 7. And is this place where the accident happened on July 1, 1944, within the territory that you take care of? A. Yes.

Q. 8. And did you go down to the scene of the accident on the morning the accident happened? A. Yes.

Q. 9. About what time did you get down there? A. About 6:50 or 6:55, I am not sure.

Q. 10. Now you tell us when you went down there just what you did and what observation, what examination, if any, you made of either switch, car or anything else. A. Well, the first thing I done when I went down there was to examine the switch.

Q. 11. You examined the switch? A. Yes.

Q. 12. Tell us what you did to examine the switch. A. I just looked it over to see if it was O. K.

Q. 13. Did you move the switch yourself? A. Yes, I did.

Q. 14. And what did you find about the operation of the switch? A. It was O. K.

Q. 15. And what was the condition of the points of the switch? A. They all fitted closely to the stock rail.

Q. 16. Close to the rail? A. Yes.

Q. 17. Now had any repairs been made on that switch after the accident? A. No, sir.

Q. 18. Did you make any examination of the roadbed before you reached the frog—do you know the frog we are talking about, the frog here [indicating on sketch] that is located at the intersection of the main line and one rail of the siding? A. I looked it over.

Q. 19. Did you notice whether there were any marks anywhere? A. Yes, sir.

Q. 20. What kind of marks did you see? A. Well, I see kind of a bright mark on the rail about 6 or 7 feet west of the frog on the Boston side.

Q. 21. 6 or 7 feet west of the frog you say you saw marks on what? A. On the rail.

Q. 22. Those marks that you saw 6 or 7 feet west of the frog on the rail of the side track? A. Well, yes.

Mr. O'Brien. Now—

Mr. Garland. All right, strike it out.

Mr. O'Brien. You have been testifying for two days and I object.

The Court. Of course Mr. Garland is a skilled trial lawyer and he knows he should not ask leading questions.

Mr. Garland. I will strike it out.

Q. 23. Where were the marks, on what rail? *A.* Between 6 and 7 feet west of the frog on the Boston side.

Q. 24. And which rail of which track? *A.* On the main line track as far as I could see.

Mr. O'Brien. You see that is a little different from your testimony.

Mr. Garland. It isn't my testimony.

The Court. No more colloquy. Let's go on.

Q. 25. Did you make an examination of any other part of the roadbed or track. *A.* No, sir.

Mr. Garland. That is all.

Mr. O'Brien. I have no questions.

LEONARD JOSEPH CASEY (Sworn).

Direct Examination by MR. GARLAND.

Q. 1. What is your full name? *A.* Leonard Joseph Casey.

Q. 2. Where do you live? *A.* Salem, Mass., 176 Essex Street.

Q. 3. How long have you lived in Salem? *A.* Seven years.

Q. 4. And what is your business? *A.* Track supervisor.

Q. 5. And you are employed by whom? *A.* The Boston and Maine Railroad.

Q. 6. How long have you been track supervisor? *A.* Seven years.

Q. 7. And do you have any duties in connection with track supervision near the place where this accident happened? *A.* Yes.

Q. 8. And what are your duties as track supervisor? *A.*

I am supposed to go out and supervise and check on the track to see that it is O. K.

Q. 9. Now did you go down to the scene of this accident on the morning the accident happened? *A.* I did.

Q. 10. About what time did you get there? *A.* I would say about 7:10.

Q. 11. Will you tell the court and jury just what you did and what examination, if any, you made? *A.* When I first went down there the first thing I did, I went to the switch stand and made a check on them, I threw the switch back and forth and left it in its normal position.

Q. 12. When you threw the switch back and forth, what did you find the condition of that switch to be? *A.* It was 100 per cent, in very good shape.

Q. 13. How many times did you throw that switch back and forth? *A.* I threw it over and back again once each way.

Q. 14. Did you also make any examination of the roadbed near the frog that we have been talking about? *A.* Yes, I went to work and checked the roadbed and also the track.

Q. 15. Tell us what you found on the roadbed near the frog. *A.* I would say 6 to 8 feet ahead of the point of the frog I went to work and found a mark on the rails and also some marks on the ties.

Q. 16. Did you make any examination of any other part of the roadbed or track besides the switch? *A.* Yes, sir, I went right along and examined all the conditions to see what the damage was.

Q. 17. And will you tell us where you went and what marks if any or damage you said you found? *A.* Well, as I said before, 6 or 8 feet west of the frog there was a mark there and that mark continued right along the side track quite a little distance.

Q. 18. How far did it continue? *A.* Well, I would say off-hand probably 65 feet, if not more.

Q. 19. Now have you told us all the examination that you made that morning that you went there, as far as you can remember? *A.* Well, the only damage that I found on the frog was right at the joint where it locks into the running rail, two of the plates were marked there.

Q. 20. How were they marked? *A.* There was a nick on the top of the nut, a flange mark, and the mark continued on and hit the spring of the frog which is the bolt that goes through the frog and bent that and for a distance down the side track, 60 or 70 feet, there was a mark on the ties.

Cross Examination by Mr. O'Brien.

XQ. 21. Did you find the bolt clipped off the frog? *A.* What do you mean, clipped?

XQ. 22. Clipped off. *A.* No, no, they were just marked.

XQ. 23. They were not clipped off, only marked? *A.* That is right.

XQ. 24. Did you hear Mr. Flynn's testimony that the bolts were clipped? *A.* No, not if my recollection serves me right. I think they were marked.

XQ. 25. You didn't make any notes of your observation? *A.* Yes, I did.

XQ. 26. Where are they? *A.* In my office.

XQ. 27. Did you know you were going to testify here? *A.* Yes, I did.

XQ. 28. Weren't you here yesterday? *A.* Yes, I thought I had the right story now.

XQ. 29. Who did you talk with about this before you came here today? *A.* Nobody.

XQ. 30. Haven't you talked with anybody since the accident? *A.* No, sir.

XQ. 31. Not a soul, about what you have testified to? *A.* Just my lawyer, that is all.

XQ. 32. Who is your lawyer? *A.* Mr. Garland.

XQ. 33. Oh, you talked with Mr. Garland. Didn't he ask you if you had any notes? *A.* No, he didn't.

XQ. 34. You didn't bring any notes when you talked with him to refresh your recollection? *A.* No, sir, I thought I had got the picture in the back of my head.

XQ. 35. You are telling the jury now what you remember since last July? *A.* That is right.

XQ. 36. Without the assistance of any notes? *A.* That is right.

XQ. 37. This frog—who has care of the frog? *A.* Who takes care of it?

XQ. 38. Who? *A.* The section foreman.

XQ. 39. That is Mr. Brady, who testified here? *A.* That is right.

XQ. 40. You have to grease that frog regularly? *A.* That frog has to be greased regularly.

XQ. 41. Is there grease underneath the frog? *A.* No, sir.

XQ. 42. Is there any grease underneath that rail so it will slip back and forth? *A.* If the point it slides on becomes dry they put oil on it.

XQ. 43. How frequently is oil put on it? *A.* That particular frog and switch and all the main line switches and frogs are inspected every day.

XQ. 44. And greased if necessary? *A.* That is right.

XQ. 45. You didn't see that frog the day before? *A.* No, I didn't.

XQ. 46. When did you see it last before this accident. *A.* Well, I believe I was doing some work on the Saugus River a short time before the accident.

XQ. 47. How long before? *A.* Well offhand probably two or three weeks.

XQ. 48. And at that time did you notice the frog? *A.* Well, I generally do all the frogs when I walked over them.

XQ. 49. You don't know whether you noticed this frog or not? *A.* I would say I did.

XQ. 50. It was all right two or three weeks before? *A.* That is right.

XQ. 51. You don't know anything about it, up until two or three weeks before the accident happened? *A.* No, that is right.

XQ. 52. Were you there when the firemen were there? *A.* No, sir.

Mr. O'Brien. That is all.

Mr. Garland. The defendant rests.

Mr. O'Brien. I have nothing in rebuttal, your Honor.

[Conference at the bench, not reported.]

The Court [addressing the jury]. We are going to be a few minutes with some questions that have arisen in this trial and arise in every other trial, and there is the necessity for one of the three of us to have a glass of milk because of physical conditions and we ought to be about fifteen minutes, so I think we will take our morning recess and then counsel can go right through with their arguments.

[Jury excused.

[Conference at the bench:]

The Court. Defendant's motion for a directed verdict allowed on the first count and denied on the second count.

Mr. Garland. Defendant's exception is saved.

The Court. Yes.

[Recess.]

The Court. Just one thing before you argue. Will you step up here, gentlemen?

[Conference at the bench not reported.]

The Court [addressing the jury]. Mr. Foreman and gentlemen: There are two counts in this complaint. In the first count I am directing you to find a verdict for the defendant and you, Mr. Foreman, will sign it, and then the clerk will record the verdict on the first count; then that will leave us with the second count which I will explain to you

later when I deliver my charge. Sign that, Mr. Foreman, and the clerk will record that verdict.

[The foreman signs verdict slip as directed by the court.]

The Clerk. On count 1 by direction of the court the jury find for the defendant.

[Arguments by counsel.]

JUDGE'S CHARGE TO THE JURY.

Mr. Foreman and Gentlemen: In this case as in all cases the facts are for you, the jury, the law is within my province. You pass upon the credibility of witnesses here and in passing on the credibility of these witnesses and determining what you believe with respect to the testimony given here by the witnesses you might bear in mind these two instructions: that mere disbelief of the testimony of a witness is not evidence that the contrary is true; and this other instruction, that the plaintiff is bound by the testimony of witnesses produced by her unless such testimony is contradicted by other evidence.

Now, Mr. Foreman, we have here a case that involves—I think I am permitted to say this—difficult questions of law for the court, and I am going today to do what I rarely do although I always make notes and follow my notes, but because of the difficulty of the law involved here which does not concern you at all, it concerns me alone and has nothing to do with you at all whether principles of law in a case are difficult or not, but I am just telling you, Mr. Foreman, that today I am going to read my charge to you which I have compiled as carefully as I could and remember you will take your law from me and whatever factual questions are to be decided in the case they are for you; in the event that I am in error with respect to the applicability of the principles of law here, Mr. Foreman, a superior court will correct me.

This is a suit, Mr. Foreman, which is brought, as has been explained to you, under the Federal Employers' Liability Act for the death of Stanley S. Jesionowski, by his widow and administratrix who is Helene A. Jesionowski.

Under the Federal Employers' Liability Act, a common carrier by railroad, engaged in commerce between the states —these things have been explained to you before, I merely repeat them so that you will keep them in mind and know what is agreed upon between the parties—a common carrier engaged in commerce between the states as was the defendant here, the Boston & Maine Railroad, is liable in damages for the death of an employee employed in such commerce, as the deceased was here—so there is no dispute about that—to his personal representative for the benefit of the surviving widow and children of the deceased employee, if the death resulted in whole or in part from the negligence of any of the officers, agents or employees of the defendant carrier.

Now, I directed you to return a verdict for the defendant with respect to one count, the first count in this declaration, and the only count now remaining for your consideration is Count 2 of the complaint which has been read to you, but for the sake of repetition the plaintiff says here:

> "As a result of the negligence of the defendant the car upon which the plaintiff's decedent was riding was derailed and as a result of the derailment the decedent was thrown from the car upon which he was riding under its wheels and was instantly killed."

Now for the pleadings, the pleadings of the defendant with respect to this complaint, this count in the complaint, the only count that remains and which has been described to you,—I will point out its position in its pleadings in simple language so that you may understand the position here of the defendant railroad.

The defendant in its answer denies it was negligent and contends the accident was caused by the sole negligence of the plaintiff's decedent, and it takes the further position that if the decedent's negligence was not the sole cause of the accident, at least his negligence contributed in part to his injuries and his death. I shall explain those matters more in detail later.

Now, ordinarily the mere happening of an accident is not evidence of negligence, but there is a class of cases where the fact of the injury itself under certain circumstances is deemed to afford reasonable evidence that the accident was due to the defendant's want of care. That is what negligence is, a want of care. This principle of the law of negligence is expressed by the phrase—you have heard it before—*res ipsa loquitur,* "the thing speaks for itself," and the plaintiff here contends it is applicable, that doctrine is applicable to the facts in this case to prove that the defendant railroad was negligent.

Now, I shall be compelled to explain that doctrine to you in some little detail. The doctrine is *res ipsa loquitur,* which is a Latin phrase meaning, "the thing speaks for itself", involves nothing more than that the plaintiff has produced proof of a fact or a series of related facts from which, according to long experience of men, an inference is warranted that the person sued has been guilty of some failure or duty toward the party claiming damages from him or it. It does not mean that such an inference is compelled. It is merely a rule of good sense based on common or crystallized experience. It does not relieve the plaintiff suing of the burden of proof. It merely puts on the party sued the duty to go on with the evidence and contradict it, or, if he can, explain how the accident came to occur otherwise than as described by the plaintiff.

Now, the Supreme Court in the case of *Sweeney* v. *Erving,*

228 U.S. 233, has summarized the *res ipsa loquitur* rule as follows:

> "In our opinion, *res ipsa loquitur* means that the facts of the occurrence warrant the inference of negligence, not that they compel such inference; that they furnish circumstantial evidence of negligence where direct evidence of it may be lacking, but it is evidence to be weighed, not necessarily to be accepted as sufficient; that they call for explanation or rebuttal, not necessarily that they require it; that they make a case to be decided by the jury, not that they forestall a verdict. *Res ipsa Loquitur,* where it applies, does not convert the defendant's general issue into an affirmative defense. When all the evidence is in, the question for the jury is whether the preponderance is with the plaintiff."

Again and in order that we may understand this doctrine, the Supreme Court in *San Juan Light Company* v. *Requena,* 224 U.S. 89, has stated when the doctrine of *res ipsa loquitur* may be invoked by the plaintiff, that is,

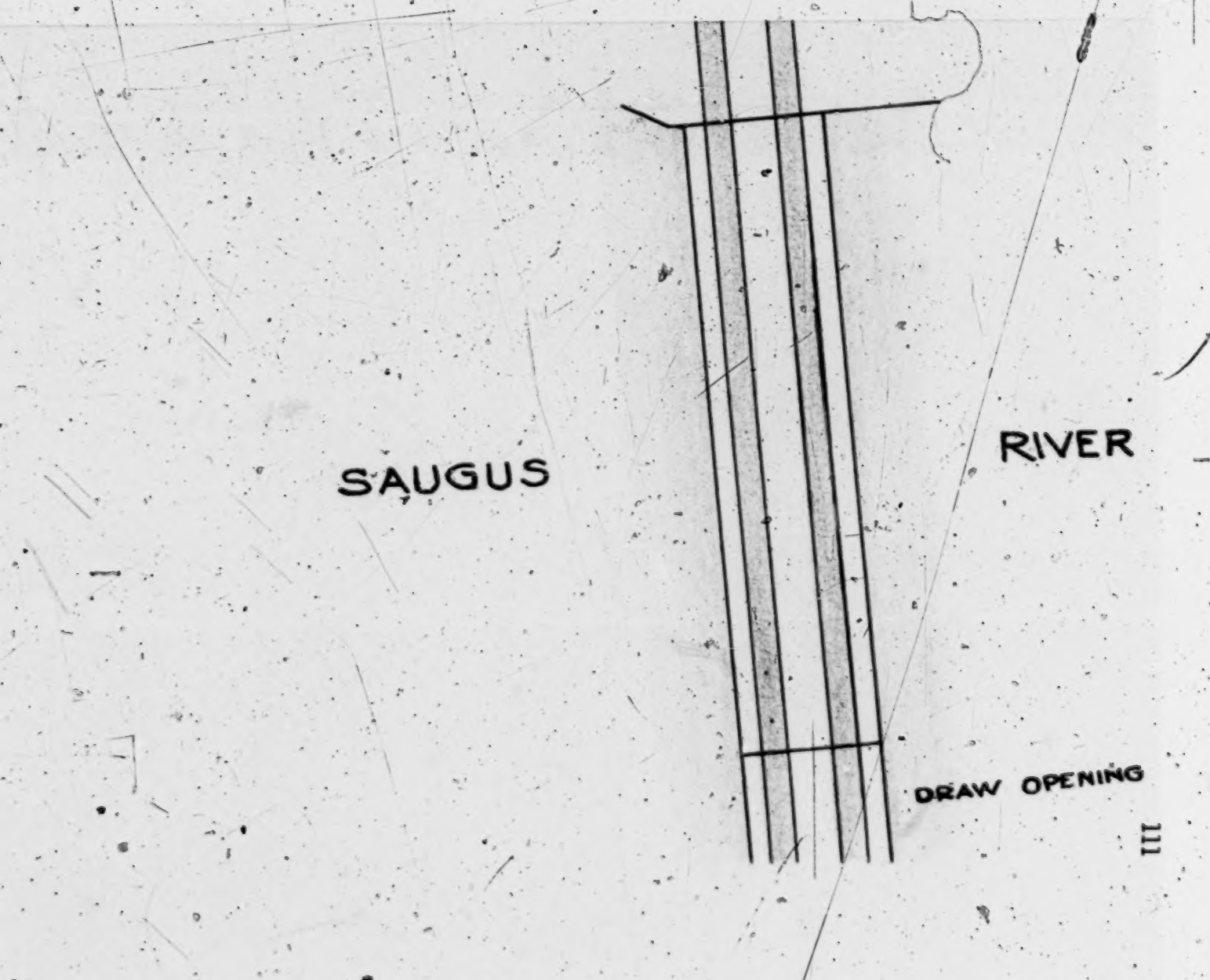
> "when a thing which causes injury, without fault of the injured person, is shown to be under the exclusive control of the defendant, and the injury is such as in the ordinary course of things does not occur if the one having such control uses proper care, it affords reasonable evidence, in the absence of an explanation, that the injury arose from the defendant's want of care."

It will be seen from what has been stated that the rule of *res ipsa loquitur* is not applicable in the present case unless you, who determine the facts, find that the defendant railroad here had exclusive control of the operation of the cars and the instrumentality or instrumentalities that caused the deceased's injuries and, further, that the injury which

causes his death would not have occurred if due care had been used by the defendant railroad in the operation of its cars and the maintenance of its instrumentalities.

There is no doubt on the evidence here, unless you find that the accident happened in the particular manner contended for by the defendant and the control of the instrumentality that caused the deceased's injury was in his own control—I shall speak about that later—the operation of the railroad, its cars, roadbed, tracks, and switches were in the exclusive control of the defendant and since a railroad and its cars are constructed and adjusted to each other with the purpose that when there is no defect in either, the cars will remain on the tracks, where one set of trucks of a car, as here, went down one track and another went down another, and a derailment occurred, as reasonable men you have a right from your experience to infer that there was some defect in the operation or in the equipment or appliances somewhere and such defect arose from such negligence on the part of the railroad or its servants. In other words, you might well find under the circumstances here from your experience, if nothing further appeared and there was no explanation of the accident otherwise than as described by the plaintiff, that unless the track, car, switch, or roadbed, was defective or the train negligently operated the car would not have been derailed.

Now, what I have said does not mean that you are bound to find negligence on the part of the facts here, it means that an accident of such a nature, while the real cause remains undiscovered, is reasonable evidence of your consideration in determining whether the accident arose from the defendant's negligence. The burden of proving the accident arose from the defendant's negligence is on the plaintiff, and also the burden of proving that the negligence, in the event you find negligence, was the proximate and efficient cause of the accident, that burden is on the plaintiff. You


SAUGUS
RIVER
DRAW OPENING

will notice now that I said, "If nothing further appeared —if there was no explanation of the accident otherwise than as stated by the plaintiff"—you would be warranted in finding on the facts here that the defendant was negligent. The defendant here does offer an explanation and it takes the position and contends that the evidence supports it, that the accident here was not only not due to any negligence on its part but contends there was a cause for this accident other than its own negligence. It contends, as I understand its position, that the improper handling of the switch by the deceased caused the accident [illegible] deceased had control of that instrumentality at [illegible] dent and his own negligent handling o[illegible]s the sole cause of the accident. Of course if the deceased's negligence was the sole cause of the accident the plaintiff here cannot recover. And since there can be no application of the doctrine of *res ipsa loquitur* if other causes than the negligence of the defendant, its agents or servants, might have produced the accident, the plaintiff is bound, she has the burden, to exclude the operation of such causes by a fair preponderance of the evidence, before the rule can be applied. This is so because if there are other causes than the negligence of the defendant that might have caused the accident, the defendant cannot be said to be in exclusive control—one of the prerequisites to the application of the rule here invoked.

Thus, you, the jury, will have to determine whether the deceased himself with the control he actually exercised over the switch might have been the cause of the accident. If he caused the accident, if he might have caused this accident by his control of that switch, you would not be justified in applying the rule of *res ipsa loquitur*. On the other hand, if no measure of control that he exercised over the switch might have been a cause of the accident, then the plaintiff has sustained her burden of excluding in this case

all causes other than the negligence of the defendant, the cause of the accident would remain undiscovered and you would be justified in applying the rule I have spoken about. If you do exclude the plaintiff's decedent as a cause of the accident, and apply the rule, you will then go on and determine the ultimate fact, whether on all the evidence the defendant, its servants or agents, were guilty of negligence in the operation of the train or in allowing a defect in its instrumentalities to exist and as I have said also the further fact as to whether that negligence was the proximate cause of the accident.

Now, I think I have explained it to you and to the other jurors that negligence may be defined as the failure of the defendant railroad to exercise the care of an ordinarily prudent railroad in the operation of its cars and the care and management of its instrumentalities.

That brings us to the evidence and the crucial fact you have to determine, and that is: Where were the four cars when the deceased threw the switch? The defendant argues that the deceased caused this accident because he signaled the cars to stop before the trucks of the last car passed to the west of the switch point, that is, towards Boston, and by doing so he caused the lead trucks, or the last trucks, whichever way you look at the train, to take the main line track while the others took the northern track, thus causing the derailment. Now, there is no question that the deceased had control of the switch for the purpose of directing the movement of the cars and in order for you to decide who caused this accident you will be compelled to determine two facts, (1) Did he throw the switch properly, and (2) Did he throw it at the proper time? I do not understand there is any dispute between the parties that he threw the switch in a proper mechanical manner, but there is a marked dispute as to the point or time at which he threw it. It would seem apparent that if the cars passed

to the west of the switch point, that is towards Boston, you would be justified in finding that he threw the switch at the proper time, and on the contrary, if he threw the switch and the cars at the rear, or the lead cars, had not passed to the east of the switch point but were partly to the west of the switch point, that is toward Lynn,— I think I should have said had not "passed to the west of the switch point", I want to be sure that I correct that—if he threw the switch and the cars at the rear or the lead cars had not passed to the west of the switch point, toward Boston, but were partly to the east of the switch point, it is rather plain he threw the switch at the wrong time and it would be convincing evidence for you to determine and justify a verdict by you that the improper handling of the switch caused the accident and the defendant did not have exclusive control of the instrumentality at the time the accident occurred.

If you find the deceased had control of the switch and the switch caused the accident you would be justified in finding the deceased was the sole cause of the accident and in that event the plaintiff could not recover and also if you made that finding, as I have already said to you, there would be no justification to apply the rule of *res ipsa loquitur*. However, if the deceased threw the switch after all the cars had passed to the west of the switch point toward Boston—on the directions that I think we all understand—the deceased exercised no further control over the switch and if the switch caused the accident the deceased could not have been said to have been a cause. In determining this issue—as to the deceased being the sole cause of the accident through his own negligence—take into consideration his age and experience as a brakeman. If he did what the defendant says he did, it was an unusual thing to do and you would have a right to consider his experience in handling switches in determining whether or

DEFENDANT'S REQUESTS FOR INSTRUCTIONS.

Now comes the defendant in the above-entitled action and requests the court to instruct the jury as follows:

. . . . . .

2. There is no evidence that would warrant a finding of negligence on the part of the defendant because of any defect or insufficiency in the car on which the plaintiff's intestate was riding at the time of the derailment.

3. There is no evidence which would warrant a finding of negligence on the part of the defendant because of any defect or deficiency in its track.

4. There is no evidence that would warrant a finding of negligence on the part of the defendant because of any defect or deficiency in its roadbed.

5. There is no evidence that would warrant a finding of negligence on the part of the defendant because of any defect or deficiency in the switch that was involved in the accident.

6. The doctrine of *res ipsa loquitur* is not applicable to the facts in this case.

7. The plaintiff's intestate had control of the switch at the time of the accident.

. . . . . .

14. There is no evidence which would warrant a finding that the derailment was due to negligence of the defendant.

FRANCIS P. GARLAND,
Attorney for the Defendant.

not he actually threw the switch before all the cars passed over it. Now, to repeat, if you find that the measure of control the deceased exercised over the switch and the manner in which he exercised that control could not in any way have been the cause of the accident, you would be warranted in finding that the exclusive control of the switch and all the other instrumentalities was in the defendant, and with the fact of derailment there is reasonable evidence from which you would be warranted in finding the defendant was guilty of negligence. If you exclude the deceased as a cause of the accident, the question you will then determine, as I have told you earlier, is: Was the defendant guilty of negligence in the operation of the cars or in allowing a defect in its instrumentalities to exist that was the cause of the deceased's death? The burden, as I have said before, with respect to this question, is upon the plaintiff to show there was negligent operation or such a defect in either the car, roadbed, tracks, or switch, and you will take all the facts and circumstances into consideration in determining this question. Of course, you will consider the evidence of the defendant with respect to the condition which it has been testified to here the instrumentalities were found to be in just immediately after the accident, and taking all the facts and circumstances into consideration it will be for you finally to say on all the evidence whether the defendant was negligent.

Regarding some of these matters it might have seemed at times, Mr. Foreman, that I was repeating some of my instructions but I have given it serious consideration and at the sake of repetition I thought you ought to understand the exact doctrine the plaintiff is invoking here in order to recover.

Now, assuming you find, without of course in any way intimating that you should, that this accident could not have been caused by the deceased, that the defendant was

NOTICE OF APPEAL.

[Filed May 10, 1945.]

Now comes the defendant Boston and Maine Railroad, by its attorney, and serves notice that in the above-entitled action it appeals to the Circuit Court of Appeals for the First Circuit from the judgment for the plaintiff on the second count of the complaint, entered by this court on the second day of May, 1945.

By its Attorney,

FRANCIS P. GARLAND.

On the tenth day of May, 1945, the defendant filed a bond in the sum of twenty-five thousand dollars, Arthur B. Nichols acting as surety, which on the same day was approved as a supersedeas by the Honorable Francis J. W. Ford, District Judge.

STATEMENT OF POINTS TO BE RELIED UPON ON APPEAL.

[Filed May 14, 1945.]

The defendant-appellant Boston and Maine Railroad, by its attorneys, states that the points upon which it intends to rely on appeal herein are as follows:

I. The District Court erred in denying the defendant's motion for a directed verdict on the second count of the complaint for the following reasons:

1. The evidence was insufficient to warrant a finding that the defendant was guilty of negligence which was the proximate cause of the death of the plaintiff's intestate.

2. The evidence was insufficient to warrant a finding that the defendant was guilty of negligence which contributed to the death of the plaintiff's intestate.

negligent and the negligence of the defendant was the proximate cause of the injuries suffered, then you come to the question of damages. That has been well expressed to you by counsel for the plaintiff.

The measure of damages for a wrongful death is what the beneficiaries for whom this action is brought, namely, the widow and the two minor children, necessarily will lose, or reasonably may be expected to lose, and, in ascertaining these damages, the jury may consider the deceased's age, health, life expectancy, earning capacity, treatment of his family, and the amount contributed to their support from his wages, and inasmuch as the measure of damages is the present cash value, adequate allowance for the earning power of the money awarded must be made.

Now, plaintiff's counsel has taken as a basis for the determination of damages those facts and divided the support of the family by the number of members of the family then existing, three of them for thirteen years, two for three years more, and the widow for seventeen years. You have heard what he has figured that to be and in making the discount because of the present cash value that will be the measure of damages.

One other question remains for you to decide in the event you find that the defendant's negligence caused this accident, and that is whether or not the deceased by his failure to exercise the care of an ordinarily prudent person to avoid the consequences of the defendant's negligence at the time of the accident contributed to the accident and the deceased's injuries. Even though you find the defendant's negligence caused the accident, yet it was the duty of the deceased himself to use reasonable care to avoid the consequences of the defendant's negligence. A person cannot abandon all care for his safety even though the other party is negligent. Now, here there is presump-

3. The evidence was insufficient to warrant a finding that the defendant was guilty of any breach of duty to the intestate.

4. The evidence did not warrant a finding that the derailment was due to any negligence of the defendant.

5. The evidence did not warrant a finding that there was any defect in the defendant's switch at the time and place of the accident.

6. The evidence did not warrant a finding that the plaintiff's intestate was injured by reason of negligence of the defendant as alleged in count II of the complaint.

7. The evidence required a finding that if the intestate was injured through negligence he was injured through his own negligence.

8. The evidence required a finding as a matter of law that the intestate's negligence was the sole proximate cause of his injuries and death.

9. The evidence required a finding as a matter of law that the intestate's conduct was the sole proximate cause of his injuries and death.

II. The District Court erred in refusing to instruct the jury, as requested by the defendant, as follows:

. . . . . .

2. There is no evidence that would warrant a finding of negligence on the part of the defendant because of any defect or insufficiency in the car on which the plaintiff's intestate was riding at the time of the derailment.

3. There is no evidence which would warrant a finding of negligence on the part of the defendant because of any defect or deficiency in its track.

4. There is no evidence that would warrant a find-

tion in the deceased's favor that he was in the exercise of due care and the burden is upon the defendant to prove by a fair preponderance of evidence that he failed to use ordinary care to avoid the consequences of the defendant's negligence. With respect to the evidence concerning that particular situation it is hardly more than meagre. We have the testimony, I think, of Mr. Whitney that the deceased person was on top of one of the cars, he had gotten up on it as they were proceeding backward, there was some evidence as to the time after that point the accident occurred, how many feet they went through, and during that time, if you find the defendant was negligent and its negligence caused the accident, was there anything that the plaintiff probably failed to do that an ordinarily prudent brakeman would have done to avoid the consequences of the accident. I might point out in a case like this that the deceased having signals to make he might have made a signal to stop the train, but did he have time to do that, would the ordinarily prudent brakeman finding himself in that position after there was a switch of the cars one going down one track and one going down the other, would he have done anything to avoid the accident, and did he fail to do something that the ordinarily prudent brakeman finding himself in that position would do to avoid the consequences of the defendant's negligence that might be said to have contributed to the accident that he ultimately suffered. It is for you to say whether or not he did anything, finding himself in the position he did at that juncture or that time.

Assuming you find the plaintiff's deceased had failed to do something that the ordinarily prudent brakeman would have done to avoid the consequences of the defendant's negligence, of course that is no defense to the plaintiff's case here. Under this particular statute the plaintiff is invoking for recovery, the Federal Employers' Liability

Act, contributory negligence is not a complete defense. In suits under this Act what is known as the rule of comparative negligence prevails. That rule means that if you find the defendant's negligence caused the accident and the plaintiff was guilty of contributory negligence in failing to avoid some of the consequences of the defendant's negligence you award damages proportionately to the manner in which his negligence contributed to the injury. For instance, if you said because of his failure to do something that he had caused about one-fiftieth part or one-tenth part of the injuries which he finally suffered, you would make a proportionate reduction in the damages.

Now, that is all I can tell you with respect to applicable principles of law in this case. It is an important case, important to both the plaintiff and the defendant, and you will treat it accordingly.

Now, Mr. Foreman, there will go out with you with the exhibits two documents which I now hold in my hand, one of them has the names of the parties concerned and it is a verdict slip on Count 2. Disregard Count 1 altogether. That is no concern of yours here in this case. This reads: "Verdict on Count 2. The jury find for the plaintiff and assess damages in the sum of"— If you reach that place write in the amount of damages, and, Mr. Foreman, you will sign it. The other document reads: "Jury find for the defendant"—and in the event you reach that determination the foreman will sign that and return that to the court.

[Conference at the bench, not reported.]

The Court. In speaking about the instrumentalities of the railroad I forgot to mention the frog, the frog was an instrumentality of the railroad.

[Conference at the bench.]

Mr. Garland. Defendant excepts to the court's re-

fusal to give defendant's requests 2, 3, 4, 5, 6, 7, and 14, which are as follows:—

2. There is no evidence that would warrant a finding of negligence on the part of the defendant because of any defect or insufficiency in the car on which the plaintiff's intestate was riding at the time of the derailment.

3. There is no evidence which would warrant a finding of negligence on the part of the defendant because of any defect or deficiency in its track.

4. There is no evidence that would warrant a finding of negligence on the part of the defendant because of any defect or deficiency in its roadbed.

5. There is no evidence that would warrant a finding of negligence on the part of the defendant because of any defect or deficiency in the switch that was involved in the accident.

6. The doctrine of *res ipsa loquitur* is not applicable to the facts in this case.

7. The plaintiff's intestate had control of the switch at the time of the accident.

14. There is no evidence which would warrant a finding that the derailment was due to negligence of the defendant.

ing of negligence on the part of the defendant because of any defect or deficiency in its roadbed.

5. There is no evidence that would warrant a finding of negligence on the part of the defendant because of any defect or deficiency in the switch that was involved in the accident.

6. The doctrine of *res ipsa loquitur* is not applicable to the facts in this case.

7. The plaintiff's intestate had control of the switch at the time of the accident.

. . . . . .

14. There is no evidence which would warrant a finding that the derailment was due to negligence of the defendant.

By its Attorneys,

FRANCIS P. GARLAND,
HURLBURT, JONES, HALL & BICKFORD,
JOSEPH P. SULLIVAN.

DESIGNATION OF CONTENTS OF RECORD ON APPEAL.

[Filed May 14, 1945.]

The defendant-appellant Boston and Maine Railroad, in accordance with the Federal Rules of Civil Procedure, designates the following to be contained in the record of appeal:

1. The pleadings.

2. Stenographic transcript of the evidence in the District Court on May 1 and 2, 1945, including the judge's charge.

2a. Plan—Exhibit 1.

3. The defendant-appellant's motion for a directed verdict on each count.

4. The court's denial of the defendant's motion for a

directed verdict on the second count with the defendant's exception thereto.

5. The defendant's requests for instructions numbered 2, 3, 4, 5, 6, 7, and 14, which were denied subject to the defendant's exceptions.

6. The jury's verdict on each count of the complaint.

7. The judgment on each count of the complaint, entered by the District Court on May 2, 1945.

By its Attorneys,

FRANCIS P. GARLAND,
JOSEPH P. SULLIVAN,
HURLBURT, JONES, HALL & BICKFORD.

CLERK'S CERTIFICATE.

I, Joseph J. Duwan, deputy clerk of the District Court of the United States for the District of Massachusetts, and during the temporary absence of the clerk in charge of the clerk's office of said court and the custodian of its files and records, do hereby certify that the foregoing is the record on appeal in the cause entitled,

No. 3079, CIVIL ACTION,

HELENE A. JESIONOWSKI,
Administratrix of the Estate of Stanley S. Jesionowski,
Plaintiff,

v.

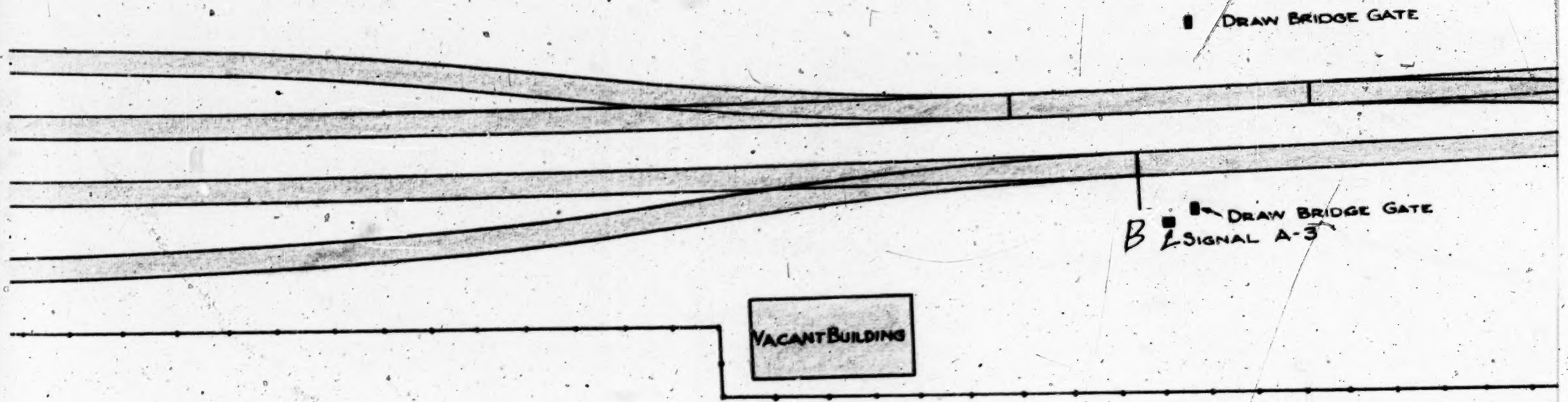
BOSTON AND MAINE RAILROAD, Defendant,

now determined in said District Court.

In testimony whereof, I hereunto set my hand and affix the seal of said court, at Boston, in said District, this third day of August, A.D. 1945.

JOSEPH J. DUWAN,
Deputy Clerk.

[SEAL]


DRAW BRIDGE GATE
DRAW BRIDGE GATE
B L SIGNAL A-3
VACANT BUILDING

[MEMORANDUM. An order of enlargement of time for docketing case to, and including August 7, 1945, is here omitted. A. I. CHARRON, *Clerk.*]

[fol. 119] PROCEEDINGS IN CIRCUIT COURT OF APPEALS

On November 7, 1945, this cause came on to be heard and was fully heard by the Court, Honorable John C. Mahoney, Honorable Peter Woodbury, and, by special assignment, Honorable Albert Lee Stephens, Circuit Judges, sitting.

Thereafter, to wit, on the first day of April, 1946, the following opinion of the Court was filed:

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT, OCTOBER TERM, 1945

No. 4108

BOSTON & MAINE RAILROAD, Defendant, Appellant,

v.

HELENE A. JESIONOWSKI, Administratrix, Plaintiff, Appellee

Appeal from the District Court of the United States for the District of Massachusetts

Before Albert Lee Stephens, Mahoney and Woodbury, JJ.

Francis P. Garland, Hurlburt, Jones, Hall & Bickford for Appellant; Thomas C. O'Brien, for Appellee.

OPINION OF THE COURT—April 1, 1946

STEPHENS, J.:

Stanley Jesionowski, a brakeman on the Boston & Maine Railroad, was killed in a train wreck, while on duty. His widow, administratrix of decedent's estate, recovered a substantial judgment upon the second count of a complaint laid in two counts against the railroad corporation for compensation to herself and the minor children in an action pursuant to the provisions of Federal Employer's Liability Act (45 U. S. C. A., §§ 51, et seq). The railroad appeals.

Early in the morning of July 1, 1944, a freight train un- [fol. 120] der appellant's operation was moving westerly and came to a stop a short distance beyond a switch point. The fourth car back from the engine was to be dropped onto the north siding. According to the testimony of the

TRACK PLAN SHOWING VICINITY OF SAUGUS RIVER DRAW

LYNN, MASS.

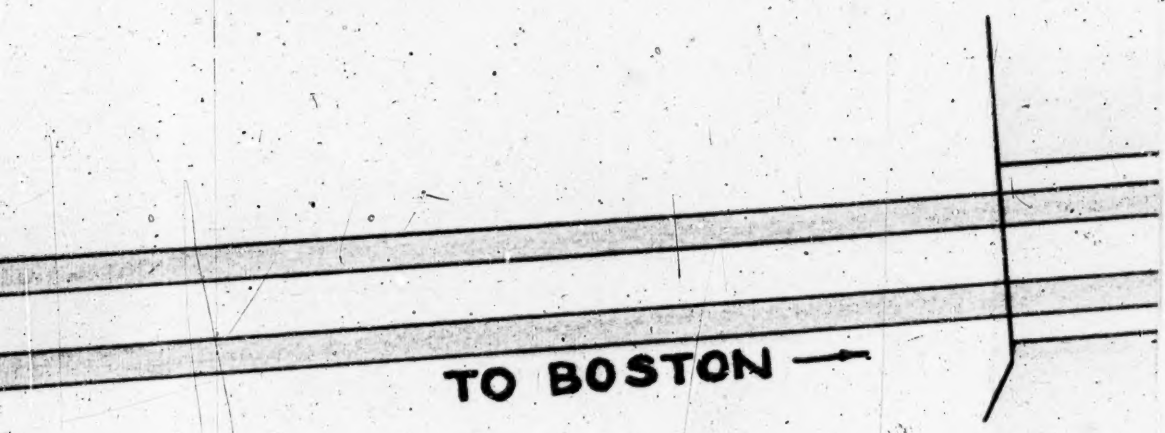
SCALE:-1 IN.=20 FT. JAN. 30, 1945

engineer, the only eye witness to the wreck, the following occurred: Jesionowski, the deceased, who was riding in the engine cab, dropped to the ground and "he went back to cut off four cars." In due time he gave the engineer the go-ahead signal by lantern, and the engineer moved the train forward until he received the stop signal from Jesionowski. The latter went to the switch stand and started back toward the car, giving a signal to back. The engineer then saw Jesionowski on the side of one of the cars, and he repeated the back-up signal though the train had already started backward. He proceeded to back at a speed of five miles per hour to enter the siding. He had backed about three car lengths when he saw splinters and planks flying about and stopped the train. Investigation revealed that although the switch mechanism had been thrown so as to bring the switch rail points against the main track rails in the proper position to direct an east bound movement of cars onto the siding, the front truck wheels of the leading car in the backward movement had not taken the switch, but continued past the switch rail points without leaving the main rails. The other truck wheels of this car and the front truck wheels of the next car had jumped the track. Part of the train had backed over the frog (75-½ feet westerly from the switch points), cutting and notching its bolts. Marks, evidently from wheel flanges, were on the rails and ties, both forward and backward from the frog. Jesionowski's dead body was lying on the track.

There is evidence to the effect that the road bed rails, switch and switch mechanism, and the frog were found in good condition, and the same is true as to the several parts of the cars involved, except only the damaged parts due to the wreck. No counter evidence is in the case. Measure-[fol. 121] ments as to the length of the cars, coupling mechanism and engine, together with the footage from the switch to the point the engine began backing, was introduced.

There are two counts to the complaint. In the first one it is alleged that Jesionowski's death was caused by reason of a defect or insufficiency, due to the negligence of the railroad corporation in its car, track or roadbed. The car upon which Jesionowski was riding was derailed, causing him to be thrown under the car wheels and killed. It is alleged in the second count that Jesionowski's death resulted from

DEFENDANT'S EXHIBIT No. 1.



the derailment of the car upon which he was riding and that the derailment was the result of the railroad corporation's negligence. No specification of any particular negligence was alleged. The second count was added as an amendment after filing of the original complaint.

By the answer the plaintiff was put upon her proof as to the defendant's alleged negligence. Contributory negligence upon the part of Jesionowski was alleged.

The court instructed the jury to return a verdict in favor of the defendant railroad on the first count, gave full instructions as to the law and left the decision upon the second count to the jury. The verdict returned was for the defendant upon the first count and for the plaintiff upon the second count. The defendant here, in the character of appellant, contends that the verdict in the first count is *res judicata* as to the second count and that therefore the judgment upon it must be set aside. The contention made its first appearance in appellant's opening brief on appeal. Rule 75(d) of the Rules of Civil Procedure is: "If the appellant does not designate for inclusion the complete record and all the proceedings and evidence in the action, he shall serve with his designation a concise statement of the points on which he intends to rely on the appeal." The record is not here in full and the designation of points relied on was made but no mention of *res judicata* was in them. Appellee insists that we ignore the contention on authority [fol. 122] of the rule, and argues that had it been in the points, the record could have been completed so as to have explained the situation in such a manner as to require us to hold against it. In addition, appellee suggests that there is nothing to it, anyway. We refuse to consider the point made but as to its merits see *Romana* v. *Boston Elec. Ry.*, 226 Mass. 532-536.

The court instructed the jury fully as to the doctrine of *res ipsa loquitur*, and this is claimed by appellant as reversible error.

It is the theory of appellant that since the operation of the switch, which was to direct the four cars from the main line onto the siding, was in the control of Jesionowski, and that since the instrumentality, which was involved in the damaging accident, was not under exclusive control of appellant, the doctrine of *res ipsa loquitur* does not apply. Upon this question the trial court was most painstaking to

explain that the jury should first consider whether or not the decedent was guilty of negligence; and that should they find him guiltless or at least guiltless as to any negligence contributing to the accident, the jury should then apply the doctrine of *res ipsa loquitur*. This was error. The possible causal actions leading up to the fatal accident cannot be so separated.

The court in its charge quoted from *San Juan Light Company* v. *Requena*, 224 U. S. 89, 98-99 (1911): "* * * When a thing which causes injury, without fault of the injured person, is shown to be under the exclusive control of the defendant, and the injury is such as in the ordinary course of things does not occur if the one having such control uses proper care, it affords reasonable evidence, in the absence of an explanation, that the injury arose from the defendant's want of care."

The "thing" which caused the injury in our case was within the confines of a compound of several elements, including the stopping of the train to begin the switching, the [fol. 123] giving of the signals, the throwing of the switch, the backing of the train, the condition of the track and track bed, the switch mechanism, the car wheel flanges and other rolling stock equipment. In this compound of elements the railroad corporation was not in exclusive control. Jesionowski was in control of important elements. In a very practical sense he, and not the corporation, was in control of very important elements, for he alone was in a position to observe; and it was his duty to observe and require the train to pull forward far enough for all of the wheels of the fourth car to clear the switch points before signaling the engineer to stop the forward movement, and the same duty continued after throwing the switch and before giving the signal to back.

The thing that caused the injury could have been Jesionowski's fault, or it could have been the railroad corporation's fault. It was the jury's duty to determine the cause of the accident, and since it must make that determination out of a set of facts wherein either one or both of the actors may have been at fault, it must do so without the aid of the doctrine of *res ipsa loquitur*.

Prosser on Torts, page 295, says that there are in general three conditions necessary for the application of this doctrine: "(1) the accident must be of a kind which ordinarily

does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff." Thus an essential element of the principle of *res ipsa loquitur* is that the defendant have exclusive control of the thing causing the injury. Such essential element is not clear in this case. *San Juan Light Co.* v. *Requena, supra; Liggett & Myers Tobacco Co.* v. *De Lape*, 109 F. (2d) 598, 601 (C. C. A. 9, 1940); *United States* v. *Porter Brothers & Biffle*, 95 F. (2d) 694, 698 (C. C. A. 5, 1938); *Gray* v. *Baltimore & O. R. Co.*, 24 F. (2d) 671, 673 [fol. 124] (C. C. A. 7, 1928); *Lynch* v. *New York, N. H. & H. R. R.*, 200 N. E. 377, 294 Mass. 152 (1936); *Massa* v. *Nippon Yusen Kaisha*, 264 N. Y. 283 (1934); *Texas* v. *P. Coal Co.* v. *Kowsilowski*, 103 Tex. 173 (1910).

The judgment of the District Court is reversed and the case is remanded to that court with directions to enter judgment for the defendant; the appellant recovers costs in both courts.

On the same day, to wit, April 1, 1946, the following judgment was entered:

JUDGMENT—April 1, 1946

This cause came on to be heard November 7, 1945, upon the transcript of record of the District Court of the United States for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now, to wit, April 1, 1946, here ordered, adjudged and decreed as follows: The judgment of the District Court is reversed and the case is remanded to that court with directions to enter judgment for the defendant; the appellant recovers costs in both courts.

By the Court, (S.) Arthur I. Charron, Clerk. (Seal.)

Thereafter, to wit, on April 3, 1946, mandate was stayed until further order of Court.

[fol. 125] CLERK'S CERTIFICATE

I, Arthur I. Charron, Clerk of the United States Circuit Court of Appeals for the First Circuit, certify that the foregoing pages, numbered 1 to 124, inclusive, contain and are a true copy of the record and all proceedings to and including April 5, 1946, in the cause in said court numbered and entitled, No. 4108, Boston and Maine Railroad, Defendant, Apppellant, v. Helene A. Jesionowski, Administratrix, Plaintiff, Appellee.

In testimony whereof, I hereunto set my hand and affix the seal of said United States Circuit Court of Appeals for the First Circuit, at Boston, Massachusetts, in said First Circuit, this fifth day of April, A. D. 1946.

Arthur I. Charron, Clerk. (Seal.)

[fol. 126] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed May 20, 1946

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit is granted, and the case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Jackson took no part in the consideration or decision of this application.

FILE COPY

Supreme Court of the United States.

OCTOBER TERM, 1945.

HELENE A. JESIONOWSKI, ADMINISTRATRIX,
Petitioner,

v.

BOSTON AND MAINE RAILROAD.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

AND

BRIEF IN SUPPORT THEREOF.

THOMAS C. O'BRIEN,
J. EDWARD KEEFE, JR.,
Attorneys for Petitioner.

Subject Index.

	Page
Petition	1
Opinion below	1
Jurisdiction	2
Questions presented	2
Statement	2
Specifications of errors to be heard	5
Reasons for granting the writ	6
Conclusion	7
Brief	9
Opinion below	9
Jurisdiction	9
Statement of case	10
The points of compass and the plan	10
The train movement	11
The instrumentalities involved	11
The conduct of deceased	12
Errors specified	12
The first specification of error (R. 122)	12
The second specification of error (R. 122, 123)	20
The third specification of error (R. 123)	22
The switch points, planks and frog	22
Conclusion	25

Table of Authorities Cited.

Cases.

Bailey v. Central Vermont Ry., Inc., 319 U.S. 350	17
Cantley v. M.K.T. R.R. Co., 353 Mo. 605	17
Doughnut Machine Corp. v. Bibbey, 65 F. (2d) 635	17, 18
Francey v. Rutland R.R. Co., 224 N.Y. 482	21
Graham v. Badger, 164 Mass. 42	17
O'Hara v. Central R. Co., 183 Fed. 739	19
Rayburn v. Pennsylvania R. Co., 76 F. (2d) 505	17

Page

San Juan Light Co. v. Requena, 224 U.S. 89 13, 16
Sweeney v. Erving, 228 U.S. 233 13, 26
Tennant v. Peoria & Pekin Union Ry. Co., 321 U.S. 29 17
Van Horn v. Pacific Refining & Roofing Co., 27 Cal. App. 105 17
Wright v. South Counties Gas Co., 102 Cal. App. 656 17

STATUTES.

Judicial Code, sec. 240 (a), as amended by Act of Feb. 13, 1925 9
Mass. G.L. (Ter. Ed.) c. 231, sec. 85 19

TEXTBOOKS.

Prosser on Torts (1941 ed.) p. 330 18
University of Chicago Law Review, vol. 1, 1933, 1934, p. 519 25

Supreme Court of the United States.

OCTOBER TERM, 1945.

HELENE A. JESIONOWSKI, ADMINISTRATRIX,
Petitioner,
v.
BOSTON AND MAINE RAILROAD.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

Helene A. Jesionowski, as she is administratrix of the estate of Stanley S. Jesionowski, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the First Circuit entered in the above case on April 1, 1946, reversing a judgment for $20,000 entered in the District Court of the United States for the District of Massachusetts upon a jury verdict.

Opinion Below.

The opinion of the Circuit Court of Appeals (R. 119) was filed April 1, 1946; petitioner's motion to stay the mandate was allowed April 3, 1946. The opinion is not yet reported.

Jurisdiction.

The jurisdiction of this court is invoked under section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

Questions Presented.

This was an action under the Federal Employers' Liability Act brought by the petitioner, Helene A. Jesionowski, Administratrix, to recover compensation for herself and minor children because of the death of her husband, a railroad brakeman, resulting from the derailment of certain freight cars (R. 1, 2). The trial judge in the District Court permitted the jury to apply the doctrine of *res ipsa loquitur* on the question of the railroad's negligence, provided the jury, upon the evidence, first exonerated the deceased from fault (R. 106). This the jury did by its verdict. The Circuit Court of Appeals held that the doctrine of *res ipsa loquitur* was not applicable upon the record. The questions presented are (1) the correctness of the interpretation by the Circuit Court of Appeals of the doctrine of *res ipsa loquitur,* (2) the applicability of that doctrine to the facts which the jury were warranted in finding upon the record, and (3) the question whether or not the defendant, merely by pleading and introducing evidence in an attempt to prove that the acts of the deceased himself were the sole cause of his injury, thereby deprived the plaintiff of her right to rely upon the doctrine of *res ipsa loquitur,* even though the jury, under explicit and clear instructions (R. 106), found that the deceased was without fault.

Statement.

The case was submitted to the jury on a count for general negligence. The defendant's answer set up not only

contributory negligence, referred to in the opinion of the Circuit Court of Appeals (R. 121), but also "that the plaintiff's intestate was guilty of negligence which was the sole proximate cause of his injuries and death" (R. 3, 4). The opinion does not refer to this part of the defendant's answer, although the proof offered was intended to support sole causation rather than contributory negligence, as will appear.

At about 5.30 a.m. July 1, 1944, Stanley S. Jesionowski, the plaintiff's intestate, age thirty-two years, was killed as the result of a derailment of certain freight cars, moving in interstate commerce, during a movement in which he participated as brakeman (R. 10-15). The movement was to detach four cars from a string of forty-nine cars on a main track, pull ahead past a switch leading into a siding (Point B on plan attached to record), and then back the four cars into the siding over the switch points at B and past a frog 75½ feet beyond B. A derailment occurred somewhere between the switch point B and the frog, both inclusive. The sole witness called by the plaintiff was one Whitney, defendant's locomotive engineer, who was the only person observing, or having opportunity to observe, Jesionowski's conduct just prior to the accident. The jury could have found from Whitney's testimony that Jesionowski cut the first four cars next to the engine from the train and then signaled the engineer to pull ahead on the main track (R. 11); that Jesionowski then got on the side of the fourth car and rode ahead; that he got off the side of the car and went sideways at right angles to the track toward the switch (Point B on plan, and R. 11, 12); that when Jesionowski was operating the switch the engineer's view of him was obstructed by intervening objects (R. 12); that Jesionowski came back into view and gave a back-up motion; that the engineer then started his back-up movement; that after Jesionowski got back on the fourth or

lead car he continued to give a back-up motion (R. 12, 13); that then the engineer saw planks and splinters going into the air; that when he went back he saw these "planks or splinters" "between the rails" "under the car there somewheres" (R. 13, 18); that immediately after the derailment he observed that the switch was properly set for the siding into which he was backing; that about 75 or 80 feet beyond the switch there was a frog (R. 21) over which the four-car cut had to pass in taking the siding (R. 18, 19); that it was a spring frog operated by the flanges of the car wheels as they hit it; that if the frog does not open when touched by the wheel flange, "probably a derailment would occur" (R. 19, 20); that he saw the planks and splinters flying first and he did not know there was a derailment until after he stopped (that is after he had gone about three car lengths, or about 135 feet, which would be beyond the frog—R. 13, 14); that Jesionowski's body was found, after the train had stopped, under the trucks of the third car, which was next to the lead car as they were backing up (that is, about 95 feet from the switch); that the train was going only 5 miles per hour.

On cross-examination of this witness defendant's counsel undertook to lay a foundation to support a theory that Jesionowski had thrown the switch while the fourth car was astride the switch points, as basis for an argument that Jesionowski's own act was the sole cause of his death. This was done by trying to show by the engineer that the front or nose of his engine stopped its forward movement precisely at point A on the plan and then by undertaking to establish precisely the length of the train. If the starting point of the calculation, (A), and length of train was 15 feet in error, one way or the other, the theory became mathematically impossible. However, the engineer testified that the stopping point was "about" at point A and that the length of the train was "about" 246 feet. He

testified that he had made no measurements, and that he made no pretension of being accurate (R. 22, 29-32). Therefore, at the end of the plaintiff's case the jury would have been amply warranted in finding that the evidence did not demonstrate that the fourth car was astride the switch point when Jesionowski threw the switch. The defendant did not strengthen its position as to this theory by the testimony of other witnesses introduced in the defendant's case.

Specifications of Errors to be Heard.

It is submitted that the Circuit Court of Appeals erred—

1. In making the following ruling:

> "It is the theory of appellant that since the operation of the switch, which was to direct the four cars from the main line onto the siding, was in the control of Jesionowski, and that since the instrumentality, which was involved in the damaging accident, was not under exclusive control of appellant, the doctrine of *res ipsa loquitur* does not apply. Upon this question the trial court was most painstaking to explain that the jury should first consider whether or not the decedent was guilty of negligence, and that should they find him guiltless or at least guiltless as to any negligence contributing to the accident, the jury should then apply the doctrine of *res ipsa loquitur*. This was error. The possible causal actions leading up to the fatal accident cannot be so separated."

2. In making the following ruling:

> "The 'thing' which caused the injury in our case was within the confines of a compound of several elements, including the stopping of the train to begin the

switching, the giving of the signals, the throwing of the switch, the backing of the train, the condition of the track and track bed, the switch mechanism, the car wheel flanges and other rolling stock equipment. In this compound of elements the railroad corporation was not in exclusive control. Jesionowski was in control of important elements. In a very practical sense he, and not the corporation, was in control of very important elements, for he alone was in a position to observe; and it was his duty to observe and require the train to pull forward far enough for all of the wheels of the fourth car to clear the switch points before signaling the engineer to stop the forward movement, and the same duty continued after throwing the switch and before giving the signal to back."

3. In making the following ruling:

"The thing that caused the injury could have been Jesionowski's fault, or it could have been the railroad corporation's fault. It was the jury's duty to determine the cause of the accident, and since it must make that determination out of a set of facts wherein either one or both of the actors may have been at fault, it must do so without the aid of the doctrine of *res ipsa loquitur*."

Reasons for Granting the Writ.

1. The record shows an appropriate case for the application of the doctrine of *res ipsa loquitur*.

2. The jury was warranted in reaching its verdict if the doctrine is applicable.

3. There is serious conflict of authority in both federal and state courts as to the nature and scope of the doctrine, and as to its applicability. This court has made no exposi-

tion of that doctrine, or of rules of applicability, since the decision in *San Juan Light Company* v. *Requena*, 224 U.S. 89, and there is serious need for directive guidance by this court for the protection of bench, bar and parties.

Conclusion.

For the foregoing reasons it is respectfully submitted that this petition should be granted.

HELENE A. JESIONOWSKI, ADMINISTRATRIX,
By her Attorneys,
THOMAS C. O'BRIEN,
J. EDWARD KEEFE, JR.

Supreme Court of the United States.

OCTOBER TERM, 1945.

HELENE A. JESIONOWSKI, ADMINISTRATRIX,
Petitioner,
v.
BOSTON AND MAINE RAILROAD.

BRIEF FOR THE PETITIONER.

Opinion Below.

The opinion of the Circuit Court of Appeals is not yet reported. It is printed in full on pages 119 to 124, inclusive, of the record accompanying this petition.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered April 1, 1946. Petitioner's motion to stay the mandate was allowed April 3, 1946. This is a petition for the issuance by the Supreme Court of the United States of a writ of certiorari under the authority of section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

Statement of Case.

The framework of facts and the errors assigned have been briefly stated in the petition and are integrated into this brief by reference. A principal error on the part of the Circuit Court of Appeals, aside from an incorrect statement of the nature and scope of the doctrine of *res ipsa loquitur*, lies in the ruling of the appellate court denying plaintiff the benefit of that doctrine. This issue, which the plaintiff contends was erroneously resolved by the court, necessitates a fuller statement of material facts and evidence than the statement set forth in the petition; especially as to points of compass, the movements of the train, the instrumentalities within the defendant's control which might have caused the fatal derailment, and the conduct of the plaintiff's decedent.

The Points of Compass and the Plan.

A stranger to the established habit of residents of New England, and particularly of railroad men, of referring to Maine as "down East" would not understand the designations of "east" and "west," used consistently by all the witnesses; for the map of New England shows that Portland is about north by northeast of Boston. It will clarify the record if, at the outset, it is firmly fixed in the mind that Portland is "east" of Boston and the train movement under scrutiny began from the "east" (Portland) to the "west" (Boston).

Defendant's Exhibit No. 1, the plan (R. 111), must be understood as showing two main tracks, the lower or north main track being used for westbound traffic, and the upper or south main track being used for eastbound traffic. The siding where the accident occurred is referred to in the testimony as the "north" siding and begins at the switch

points opposite the switch "B" and runs "east." It is the siding next to the "vacant building" and next to the General Electric Company works referred to in the testimony. The "frog" referred to in the record is 75½ feet (R. 40) east of "B" at a point where the north rail of the westbound main track is intersected by the south rail of the north siding. It is not marked on the plan but is clearly identifiable through the testimony.

The Train Movement.

The freight train involved in the accident had come from the "east" (Portland), passed a mile or so beyond West Lynn, *en route* to Boston, and stopped at some point east of switch "B." The next movement was to cut off the engine and the first four cars from the forty-nine car freight train, to pull ahead toward Boston until the fourth car cleared the switch "B," to throw the switch for the north siding, and to back the four cars into the north siding and leave them there. It was during this backing movement that the derailment occurred.

The Instrumentalities Involved.

The instrumentalities, as shown by the testimony, were the engine and cars, the tracks, the roadbed, the switch, switch points, and connecting mechanism, at "B," the flanges of the wheels, the spring frog, and planks between the rails. We do not include in the above list as part of the "thing" which caused the injury "the stopping of the train to begin the switching, the giving of the signals, the throwing of the switch, the backing of the train," all of which are included by the Circuit Court of Appeals in its definition of "thing" as that word appears in the classic doctrine of *res ipsa loquitur*.

THE CONDUCT OF DECEASED.

As to this, the jury warrantably found Jesionowski guiltless of negligence; therefore, there being no explanation as to how the derailment occurred, the derailment itself, and the circumstances accompanying it, permitted the application of *res ipsa loquitur*.

Other facts and evidence will be referred to when needed in the discussion of the several specifications of error.

Errors Specified.

There are three specifications of error in the petition. The brief will attempt to deal with them separately, but this treatment cannot be precisely carried out; errors, which are set out by way of quotations from the opinion of the Circuit Court, intermingle with each other.

THE FIRST SPECIFICATION OF ERROR (R. 122).

The quotation from the opinion attacked under this heading does not include a short paragraph immediately preceding the specification. This paragraph reads (R. 122): "The court instructed the jury fully as to the doctrine of res ipsa loquitur, and this is claimed by appellant as reversible error." However, neither party took exception to the whole or a smallest part of the charge. It is submitted that the doctrine as given to the jury became the law of the case. Nevertheless, erroneously, the Circuit Court not only denied the applicability of the doctrine, but proceeded to enunciate its own doctrine. The Circuit Court had no right to substitute its own conception of the rule for the law given to the jury, because the defendant did not take exception to the statement of rule of *res ipsa* as it was stated to the jury. Yet it did so. And the appellate court

substituted a false concept of the rule for the correct statement of the trial judge.

Those portions of the judge's charge referred to in the several specifications of error are as follows:

> "Whatever factual questions are to be decided in the case are for you" (R. 98).
>
> "The defendant in its answer denies it was negligent and contends the accident was caused by the sole negligence of the plaintiff's decedent" (R. 100).

The judge proceeded to define *res ipsa loquitur*, quoting from the classic cases, *Sweeney* v. *Erving*, 228 U.S. 233 (1913), and *San Juan Light Co.* v. *Requena*, 224 U.S. 89 (1912) (R. 100, 101).

> "Now, what I have said does not mean that you are bound to find negligence on the part of the facts here, it means that an accident of such a nature, while the real cause remains undiscovered, is reasonable evidence for your consideration in determining whether the accident arose from the defendant's negligence" (R. 102).
>
> "The defendant here does offer an explanation and it takes the position and contends that the evidence supports it, that the accident here was not only not due to any negligence on its part but contends that there was a cause for this accident other than its own negligence. It contends, as I understand its position, that the improper handling of the switch by the deceased caused the accident and the deceased had control of that instrumentality at the time of the accident and his own negligent handling of the switch was the sole cause of the accident. Of course, if the deceased's negligence was the sole cause of the accident the plain-

tiff here cannot recover. And since there can be no application of the doctrine of res ipsa loquitur if other causes than the negligence of the defendant, its agents or servants, *might* have produced the accident, the plaintiff is bound, she has the burden, to exclude the operation of such causes by fair preponderance of the evidence before the rule can be applied. This is so because if there are other causes than the negligence of the defendant that might have caused the accident, the defendant cannot be said to be in exclusive control —one of the prerequisites to the application of the rule here invoked" (R. 103).

"Thus, you, the jury, will have to determine whether the deceased himself with the control he actually exercised over the switch *might* have been the cause of the accident. If he caused the accident, if he *might* have caused the accident by his control of that switch, you would not be justified in applying the rule of res ipsa loquitur. On the other hand, if no measure of control that he exercised over the switch might have been the cause of the accident, then the plaintiff has sustained her burden of excluding in this case all causes other than the negligence of the defendant, the cause of the accident would remain undiscovered and you would be justified in applying the rule" (*res ipsa loquitur*) (R. 103, 104).

"Now, there is no question that the deceased had control of the switch for the purpose of directing the movement of the cars and in order for you to decide who caused the accident you will be compelled to determine two facts, (1) Did he throw the switch properly, and (2) Did he throw it at the proper time? *I do not understand there is any dispute between the parties that he threw the switch in a proper mechanical*

manner, but there is a marked dispute as to the point or time at which he threw it" (R. 104).

"If the deceased threw the switch after all the cars had passed to the west of the switch point toward Boston—the deceased exercised no further control over the switch and if the switch caused the accident the deceased could not have been said to have been a cause. In determining this issue—as to the deceased being the sole cause of the accident through his own negligence—take into consideration his age and experience as a brakeman. If he did what the defendant says he did, it was an unusual thing to do and you would have a right to consider his experience in handling switches in determining whether or not he actually threw the switch before all the cars passed over it" (R. 105, 106).

That part of the opinion of the Circuit Court which the petitioner has designated as her first specification of error reads:

"It is the theory of appellant that since the operation of the switch, which was to direct the four cars from the main line onto the siding, was in the control of Jesionowski, and that since the instrumentality, which was involved in the damaging accident, was not under exclusive control of appellant, the doctrine of rés ipsa loquitur does not apply. Upon this question the trial court was most painstaking to explain that the jury should first consider whether or not the decedent was guilty of negligence, and that should they find him guiltless or at least guiltless as to any negligence contributing to the accident, the jury should then apply the doctrine of res ipsa loquitur. This was error.

The possible causal actions leading up to the fatal accident cannot be so separated."

The appellate court does not cite a single authority in support of this ruling.

Before attempting to analyze, if possible, just what the ruling means, we should point out a fatal error of fact in the opinion. The ruling *assumes* that the switch was the only res "involved in the damaging accident." There is much more testimony in the record relating to planks and the frog as possible causes of the derailment than testimony relating to the switch. And this plank-and-frog evidence seems to counsel to point strongly to derailment *after* the fourth or lead car had passed the switch points safely. It must be conceded, on the record, that Jesionowski had not the slightest control of these other instrumentalities. (The contention of the plaintiff on this point will be discussed later under the heading "The switch points, the planks, and the frog.")

We first discuss the ruling up to and including the words "This was error," leaving the last sentence of the ruling to be dealt with as a statement of the reason for the ruling.

The ruling seems to mean one thing and one only, *i.e.*, that, the trial judge having submitted the question of the guilt or innocence of the deceased to the jury, the doctrine of *res ipsa loquitur* could never thereafter be used by the jury. This seems to counsel an astounding proposition, utterly unsupported by the statement of the rule as it appears in the case of *San Juan Light Co.* v. *Requena*, or by any bench authority, or by logic or reason. Indeed, this offensive ruling clearly violates the definition of *res ipsa* as stated in the San Juan case, which is, in part: "When a thing causes injury, *without fault of the injured person*," etc. Now it is clear that the burden is on a plaintiff to

exonerate himself from all blame. He must be utterly guiltless. It is one of the imperative *conditions precedent* to his right to use the rule of *res ipsa*. Plainly this is a question of fact for the jury. The trial judge may not rule upon it as matter of law unless the evidence as to the plaintiff's innocence is so slight that it must be said to fall short of the liberal rule of withdrawability established recently by this court in Employers' Liability cases: *Bailey* v. *Central Vermont Ry., Inc.*, 319 U.S. 350; *Tennant* v. *Peoria & Pekin Union Ry. Co.*, 321 U.S. 29.

The jury found the defendant guiltless.

It is not easy to find authorities one way or the other as to whether or not the question of a plaintiff's freedom from fault, as those words are used in the statement of the *res ipsa* rule, is a question of fact for the jury. Obviously it is a question of negligence, and such a question is for the jury. The following cases directly or by necessary implication hold that the plaintiff's freedom from fault is a jury question:

Van Horn v. *Pacific Refining & Roofing Co.*, 27 Cal. App. 105, 109.

Wright v. *South Counties Gas Co.*, 102 Cal. App. 656, 664.

Cantley v. *M.K.T. Railroad Co.*, 353 Mo. 605.

Graham v. *Badger*, 164 Mass. 42, 48.

Rayburn v. *Pennsylvania R. Co.*, 76 F. (2d) 505, 506.

Doughnut Machine Corp. v. *Bibbey*, 65 F. (2d) 635 (1st Cir.).

It will be noted that the last case cited, *Doughnut Machine Corp.* v. *Bibbey*, was decided in the first appellate district in 1933, Justices Bingham, Wilson and Anderson sitting. Apparently the present court intended to overrule

its own precedent, wherein the question of plaintiff's negligence was left to the jury, while still permitting application of the doctrine of *res ipsa*. The present court could not have missed it, because it was cited in the plaintiff's brief in the case at bar. The rule stated in our first specification of error cannot possibly be harmonized with the rule as stated in the Doughnut Machine case, which latter statement is good law, in our opinion, whereas the statement in the case at bar we believe to be utterly bad law.

In Prosser on Torts (1941 ed.) p. 330, it is said:

> "*Allied* to the condition of exclusive control in the defendant is that of absence of any action on the part of the plaintiff contributing to the accident. Its purpose, of course, is to eliminate the possibility that it was the plaintiff who was responsible. If the boiler of a locomotive explodes while the plaintiff engineer is operating it, the inference of his own negligence is at least as great as is that of the defendant, and res ipsa will not apply *until he has accounted for his own conduct*. But the requirement may easily be misunderstood. The plaintiff is seldom entirely static, and it is not necessary that he be completely inactive, *but merely that there be evidence removing the inference of his own responsibility*. If the evidence is sufficient to eliminate the plaintiff's contribution . . . the weight of modern authority is heavily in favor of the application of res ipsa loquitur to employees."

Moreover, the defendant pleaded and attempted (feebly) to prove that the deceased caused the derailment by throwing the switch before the trucks of the fourth car had cleared the switch points at "B." If the mere introduction of this evidence, which was submitted to but did not convince the jury, can be said to wipe out the application

of the doctrine of *res ipsa* then indeed in every case where a brakeman throws a switch properly and then gives a motion to pass over the switch points, and a derailment occurs, killing him instantly, under the ruling here attacked, his widow and children are automatically deprived of the benefits of the doctrine of *res ipsa;* and in derailment accidents (they occur almost daily) where there is no evidence of specific negligence on the part of the defendant railroad, the widow and children are deprived of the benefits of the Federal Employers' Liability Act.

The claim that Jesionowski signaled the train to back up before the fourth car in the forward movement had cleared the switch at "B" was purely an affirmative defense. The burden was on the defendant to prove this alleged fact by a fair preponderance of the evidence.

General Laws of Massachusetts (Ter. Ed.) c. 231, sec. 85.
O'Hara v. *Central R. Co.*, 183 Fed. 739.

The last sentence in the first specification is "The possible *causal actions* leading up to the fatal accident cannot be so separated." We are unable to find a recognizable legal thought or principle in this statement. Every day juries are engaged in negligence cases in separating the causal actions of a plaintiff from the causal actions of a defendant. That is the sole ground for their verdicts. And in the case at bar the prime function of the jury was to say whether the plaintiff or the defendant was to blame. The doctrine of *res ipsa* is simply a rule of evidence to assist the jury in making the necessary separation. If the doctrine is applicable, the jury may say that the defendant is guilty, or they may not. It is futile to attempt further argument as to the meaning of a legal statement which does not, to us, make sense.

THE SECOND SPECIFICATION OF ERROR (R. 122, 123).

The second specification of error covers the following excerpt from the Opinion of the Circuit Court:

> "The 'thing' which caused the injury in our case was within the confines of a compound of several elements, including *the stopping of the train to begin the switching, the giving of the signals, the throwing of the switch, the backing of the train,* the condition of the track and track bed, the switch mechanism, the car wheel flanges and other rolling stock equipment. In this compound of elements the railroad corporation was not in exclusive control. Jesionowski was in control of important elements. In a very practical sense he, and not the corporation, was in control of very important elements, for he alone was in a position to observe; and it was his duty to observe and require the train to pull forward far enough for all the wheels of the fourth car to clear the switch points before signaling the engineer to stop the forward movement, and the same duty continued after throwing the switch and before giving the signal to back."

Here again, as in the first error, the assumption is made that the derailment could not have occurred at any point except the switch. In view of other probabilities relating to planks and the frog, greater probabilities as we read the record, this assumption, excluding the other probabilities, invalidates the whole of the opinion contained in the second specification of error. But there is even graver fault, for the opinion states that the "thing" which caused the injury was within the confines of a compound of several elements consisting in part of *conduct* on the part of the deceased. These conduct "things" are italicized above. The word "*res*" in the phrase "*res ipsa loquitur*" means

"thing," not conduct. From the very beginning of the rule in England to the present day in this Country cases involving the doctrine and its application have dealt with "things," inanimate objects, machines, mechanisms; including the inanimate adjuncts of railroads—engines, cars, boilers, tracks, roadbeds, rails, switch points, frogs. In *Francey* v. *Rutland R.R. Co.*, 224 N.Y. 482 (1918), often cited and sometimes, perhaps inaccurately, called a leading case, it is said at page 484:

> ". . . the inference that the accident was due to the negligence of the one having possession or control of the *article or thing* which caused the injury. The inference is not drawn merely because the thing speaks for itself, but because all of the circumstances surrounding the accident are of such a character that *unless an explanation be given [by the defendant] the only fair and reasonable conclusion is that the accident was due to some omission of defendant's duty.*"

In other words, the *res* or "thing," as used in the doctrine, must be something that permits an inference against *the defendant only*, and not against the plaintiff. The plaintiff's conduct is a separate matter, relating in some cases to the control or proper handling of a "thing."

Of course the deceased controlled the movement of the train, and if he did so negligently, the plaintiff cannot recover. The jury has said, under "painstaking instructions," that the deceased was in no way to blame.

Control, in the doctrine, cannot mean control of one's self, but control of a thing; and certainly a train movement is not a "thing."

Consider the situation if the law enunciated by the appellate court is sound. Would it not be this, that every time a brakeman gives a signal which is followed by a derail-

ment, the precise cause of which is not ascertainable, he loses the advantage of the doctrine of *res ipsa loquitur?*

THE THIRD SPECIFICATION OF ERROR (R. 123).

"The thing that caused the injury could have been Jesionowski's fault, or it could have been the railroad corporation's fault. It was the jury's duty to determine the cause of the accident, and since it must make that determination out of a *set of facts* wherein either one or both of the actors may have been at fault, it must do so without the aid of the doctrine of res ipsa loquitur."

This statement again disregards the verdict, the finding that Jesionowski was without fault. It substitutes a judicial dictum that Jesionowski could have been at fault. It denies the existence of a fact legally established by the proper fact-finding body.

The nub of the error here is the statement that the jury "must make that determination out of a set of facts wherein either one or both of the actors may have been at fault." This is clearly a false premise. If our argument that the verdict exonerated Jesionowski from blame is sound, there was only one issue left: Was the defendant negligent?

The Switch Points, Planks and Frog.

The only witness called by plaintiff was the defendant's locomotive engineer, one Whitney. He had been in defendant's employ for forty-five years (R. 10). He testified that switch points are those parts of the ends of the rail which will move when a switch is thrown to allow an opening into one track or another. The switch points are connected together by two rods, and a third rod connects the

rails to the switch itself (R. 16, 17). They were steel rails, about 7 or 8 feet long, tapering to a point at the place of contact with the other rails. (Parenthetically, it appeared later, by accurate measurements, that these points were 15 feet long (R. 38, 39).) He further testified that the accident happened at 5.30 on the morning of July 1, 1944, but that the sun had not yet come up (R. 10). (At the trial it was treated as a matter of common knowledge that the sun rose at 5.07 a.m. on July 1. The scene of the accident is near the seashore. No intervening elevations prevented the sun having its natural effect as soon as it rose at the sea horizon. The scene of the accident is about 8 miles from Boston to the west, and 8 miles from Salem to the east. Noel, defendant's wreckmaster, who lived in Lynn, less than 3 miles from the scene, did not reach it until between 7 and 7.15 a.m. (R. 49, 50). Sweeney, defendant's trainmaster, lived in Salem and reached the scene about 6.20 a.m. (R. 62). Flynn, defendant's assistant division engineer, lived in Belmont, a near suburb of Boston, and reached the scene about 7.30 a.m. (R. 72). Brady, defendant's section foreman, lived in West Lynn, where the derailment occurred. He arrived at the scene about 6.50 or 6.55 a.m. (R. 91, 92). Casey, defendant's track supervisor, lived in Salem. He arrived at the scene about 7.10 a.m. (R. 93, 94). Whitney, the engineer, testified that he *saw* "planks, splinters, flying . . . and there was a derailment." From this evidence and the fact that part of the wreck blocked a busy main line, the jury probably found that the derailment happened considerably later than 5.30 a.m.; that it was broad daylight when Jesionowski threw the switch, and that the signals were *not* given by lantern.)

While it is undisputed that the switch was properly thrown, nevertheless it was open to the jury to find, under the doctrine of *res ipsa loquitur*, that there was something wrong with the connecting rods, or the switch points, or

other switch mechanisms, which caused the derailment. The jury was not required by law to believe the defendant's explanation as to any "things" within the locus of the derailment.

But the opinion of the Circuit Court utterly ignores several important circumstances accompanying the derailment:

Whitney "saw planks and splinters flying first . . . and it was a derailment and I immediately stopped" (R. 13). He further testified that he had backed up 120 feet and *then* saw planks flying (R. 14). It is clear that Whitney, the only eyewitness, neither saw nor heard nor felt anything unusual in the running of the train until he had backed up 120 feet. Then he saw the planks and stopped. He later noticed these planks between the rails under the car (R. 18). The speed of the train was 5 miles per hour (R. 14). The train went 15 feet after Whitney saw the planks (R. 29). The distance from the switch to the frog was 75½ feet. Flynn testified that there were marks on top of the rail *69 feet east* of the switch. They began at that point. "They were dents, traces of a wheel that had cut into the top." Having in mind that the train went 120 feet before the engineer saw the planks and the marks on the top of the rail, facts testified to by defendant's own employees, two rational conclusions were left open for the jury: (1) that the fourth car, in the forward movement preparatory to backing into the siding, *must* have cleared the switch points by at least 30 feet before Jesionowski gave the back-up signal; and (2) that it was more probable, or at least as probable, that the derailment occurred at or near the frog by reason of planks between the rails or a defective condition of the frog or flanges (not infrequently the cause of derailments) and this conclusion is strengthened by the uncontradicted testimony that Jesionowski's body lay under the truck of the third car from the engine.

The engineer, Whitney, testified that the frog was a spring frog opened up by flanges of car wheels to allow a train to cross over the rails of one track onto the rails of another; that after the cross-over is completed, the frog closes automatically; and that if (by reason of defective flanges or a defect in the frog mechanism) "the frog does not open when touched by a flange," the result would be "probably a derailment" (R. 19, 20).

None of the important things referred to above were given any consideration by the Circuit Court. Only the "thing" over which Jesionowski had a temporary user control (which had ended before the derailment occurred) was referred to by the court as basis for its opinion. The exclusion of these other matters, the planks, the frog and the flanges, from the circumstances surrounding the accident clearly constitutes fatal error on the part of the appellate court.

Conclusion.

The plaintiff ought to have her writ because—

1. If the Circuit Court erred as claimed in plaintiff's specification of errors, these errors, if allowed to stand, destroy the very foundation of plaintiff's right to a verdict. If the errors are corrected upon the principles expounded in petitioner's accompanying brief, or for any other reason, the record and the law sustain the verdict.

2. "The law relating to res ipsa loquitur is replete with conflict, confusion and doubt. There is division of opinion as to circumstances required for its application and still greater disagreement as to the effect to be given it." Professor Charles E. Carpenter, in University of Chicago Law Review, vol. 1, 1933, 1934, p. 519.

Counsel have spent many tedious hours in an effort to find a straight thread leading out of the labyrinth of conflicting judicial statement to a point in the field of legal certitude. It need not be urged upon this court that the bar is confused. That is a matter of common knowledge to the bench. Counsel have failed to find any analysis of the doctrine of *res ipsa loquitur* by the Supreme Court of the United States since 1913 (*Sweeney* v. *Erving*, 228 U.S. 233). And that decision does not help us as to the solution of the problems raised by the opinion of the Circuit Court in the case at bar. The law, it is submitted, needs clarification by the Supreme Court of the land.

THOMAS C. O'BRIEN,
J. EDWARD KEEFE, JR.,
Counsel for the Petitioner.

OF COUNSEL:
JOHN S. STONE.

FILE COPY

Office - Supreme Court, U. S.
FILED
SEP 9 1946
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States.

OCTOBER TERM, 1946.

No. 88.

HELENE A. JESIONOWSKI, ADMINISTRATRIX,
Petitioner,

v.

BOSTON AND MAINE RAILROAD,
Respondent.

BRIEF FOR THE PETITIONER.

THOMAS C. O'BRIEN,
J. EDWARD KEEFE, JR.,
Attorneys for the Petitioner.

JOHN S. STONE,
Of Counsel.

ADDISON C. GETCHELL & SON, LAW PRINTERS, BOSTON.

Subject Index.

	Page
Statement of case	2
Pleadings	2
Opinion of the Circuit Court of Appeals	4
Points of argument	6
Argument	7
Point one	7
Points two and three	10
User control	10
Point four	28
Point five	32
Conclusion	33

Table of Authorities Cited.

Cases.

Bailey v. Central Vermont Ry., 319 U.S. 350	20
Baltimore & Ohio R. Co. v. Groeger, 266 U.S. 521	18
Baltimore & Potomac R.R. Co. v. Landrigan, 191 U.S. 461	18
Bimberg v. N.P. Ry. Co., 217 Minn. 187	20
Boston & Maine v. Cabana, 148 F. (2d) 150	20
Byrne v. Boadle, 2 H. & C. 722	17
Cantley v. Missouri-Kansas-Texas R. Co., 353 Mo. 605	15
Central Vermont Ry. Co. v. White, 238 U.S. 507	18
Cochrane v. Pittsburgh, 31 F. (2d) 769	30
Doughnut Machine Corp. v. Bibbey, 65 F. (2d) 634	16
Gregory v. Maine Central R.R. Co., 317 Mass. 636	20
Hough v. Texas & P.R. Co., 100 U.S. 213	18
Lavender v. Kurn, 90 S.C. Law. Ed. 692; 66 S. Ct. 740	20

Page

Leathem Smith-Putnam Nav. Co. v. Osby, 79 F. (2d) 280; cert. den. 296 U.S. 653 18
Leet v. Atchison, T. & S. Fe Ry. Co., 66 Cal. App. (2d) 413 20
Leet v. Union Pacific R. Co., 144 P. (2d) 64 30
McNamara v. Boston & Maine R.R., 202 Mass. 491 30
Murphy v. Boston & Maine R.R., 319 Mass. 413 (Mass. Adv. Sh. 1946, 459) 20
Northern Pacific R. Co. v. Amato, 144 U.S. 465 18
Northern Pacific R. Co. v. Mares, 123 U.S. 710 18
O'Hara v. Central R. Co., 183 Fed. 739 18
Osgood v. Los Angeles Traction Co., 137 Cal. 280 16
Palmer v. Hoffman, 318 U.S. 109 18
Rayburn v. Penn. R. Co., 76 F. (2d) 505 18
Sampson v. Channell, 110 F. (2d) 754 18
San Juan Light Co. v. Requena, 224 U.S. 89 8, 10, 11, 17, 18, 28, 29, 32, 33
Scott v. The London & St. Katherine Dock Co., 3 H. & C. 596 17
Sweeting v. Penn. R. Co., 142 F. (2d) 611 12, 13, 14, 20
Tennant v. Peoria & Pekin Union Ry. Co., 321 U.S. 29 20
Tiller v. Atlantic Coast Line R. Co., 318 U.S. 54 20
Van Horn v. Pacific Refining & Roofing Co., 27 Cal. App. 105 16
Washington & Georgetown R. Co. v. Harmon's Admr., 147 U.S. 571 18

STATUTE.

Federal Employers' Liability Act (U.S.C. Title 45, c. 2, secs. 51 et seq.) 1, 3, 12, 19, 30

TEXTBOOKS.

	Page
38 American Jurisprudence, at p. 997	15
38 American Jurisprudence, at p. 1007	29
Prosser on Torts (1941 Ed.) at p. 300	14
Shearman & Redfield on Negligence (Rev. Ed. 1941) p. 156	9
Wigmore (Third Ed. 1940), vol. IX, sec. 2509, p. 377	9

Supreme Court of the United States.

OCTOBER TERM, 1946.

No. 88.

HELENE A. JESIONOWSKI, ADMINISTRATRIX,
Petitioner,
v.
BOSTON AND MAINE RAILROAD,
Respondent.

BRIEF FOR THE PETITIONER.

A jury in the District Court for the District of Massachusetts returned a verdict for $20,000, in an action brought by the petitioner under the Federal Employers' Liability Act (U.S.C. Title 45, c. 2, secs. 51 *et seq.*), to recover compensation for herself and minor children because of the death of her husband, Stanley Jesionowski. Jesionowski was employed as a brakeman by respondent, and at the time that he was killed both he and the respondent were engaged in interstate commerce.

The Circuit Court of Appeals for the First Circuit reversed the judgment entered upon the verdict and remanded the case to the District Court with directions to enter judgment for the defendant railroad (R. 123).

On May 20, 1946, this Court granted certiorari.

Statement of Case.

On the morning of July 1, 1944, Stanley Jesionowski was instantly killed as the result of the derailment of a cut of four freight cars which had been cut off from a train of forty-nine freight cars standing on the main line of respondent's tracks near West Lynn, Massachusetts (R. 10, 11). This four-car cut was to be pulled ahead, westerly, on the main line, past the switch point B (Defendant's Exhibit No. 1, R. 111), and then backed into the "north siding," so called, which is the track nearest the "vacant building" shown on Exhibit No. 1. It was Jesionowski's duty to give a stop signal after the cut of cars had passed beyond point B, to throw the switch at B for the siding, and to ride the cut into the siding. The derailment occurred during the back-up movement (R. 10, 11, 12, 13). A more detailed statement of this switching movement, a description of the locus, and an account of the circumstances leading up to and surrounding the derailment will be found on pages 2, 3, 4, 10, and 11 of the petition for certiorari and petitioner's brief in support thereof.

Pleadings.

The complaint contained two counts, the second count being one for general negligence under which the case was submitted by the trial judge to the jury with instructions as to the nature and applicability of the doctrine of *res ipsa loquitur*. Neither party took exception to the whole or any portion of the judge's charge.

The disposition of the first count by the court, which the respondent claimed constituted *res adjudicata* as to the second count, will be discussed as the fifth point in this brief.

The respondent's answer to the second count, beside a denial of negligence, alleged the following:

> "And further answering the second count of the complaint, the defendant says that the plaintiff's intestate was guilty of negligence which was the *sole proximate cause* [italics ours] of his injuries and death.
>
> "And further answering the second count of the complaint, the defendant says that the plaintiff's intestate was guilty of negligence which contributed in whole or in part to his injuries and death." (R. 5, 6.)

Contributory negligence is not a defense under the Federal Employers' Liability Act, and it is not discussed in the opinion of the Circuit Court of Appeals.

The respondent did not rest at the close of petitioner's case, nor did it move then that a verdict should be returned for the respondent on the ground that the causative instrumentalities were not within the exclusive control of the respondent. On the contrary, the respondent undertook to show (1) that the instrumentalities were in proper condition and (2) that the deceased threw the switch while the switch points were between the trucks of the first or lead car of the cut of four cars intended for the north siding, and that thereby, by his own negligent act, he created the *sole* cause of his death. The pleading and attempt by the respondent to prove this *sole* causation, and the effect upon the applicability of the doctrine of *res ipsa loquitur* of such pleading and attempt at proof, are the only questions of law discussed in the opinion of the appellate court.

At the close of all the evidence respondent pressed its motion for a directed verdict on the second count, which was denied and exception saved (R. 97). In this motion respondent stated nine grounds for its allowance (R. 7, 8). Only grounds 7, 8, and 9 refer to Jesionowski's own act as

the sole cause of his death, *and not one of them raises the issue of the applicability of the doctrine of res ipsa loquitur.* The respondent also saved its exceptions to the refusal of the trial judge to give the jury certain instructions (R. 109, 110, 113). Only two of them, Nos. 6 and 7, relate to the only question discussed in the opinion of the appellate court, *i.e.,* the right of the petitioner to have the jury apply the doctrine of *res ipsa loquitur,* together with all the evidence in the case, in determining the liability of the respondent. These two requests are:

> "6. The doctrine of *res ipsa loquitur* is not applicable to the facts in this case.
>
> "7. The plaintiff's intestate had control of the switch at the time of the accident." (R. 110.)

It is important to note here that in neither of these requests did the respondent ask the court to instruct the jury as to control of "the stopping of the train to begin the switching, the giving of the signals, the throwing of the switch, the backing of the train, the condition of the track and the track bed, the switch mechanism, the car wheel flanges and other rolling stock equipment" (Opinion of Circuit Court of Appeals, R. 122). These extraneous objects of control were injected into the case by the appellate court. In so doing the court clearly went outside of the instructions requested, denied, and excepted to.

Opinion of the Circuit Court of Appeals.

The opinion appears *in toto* on pages 119 to 123, inclusive, of the record. It is reported in 154 F. (2d), beginning at page 703. We think there is nothing in the opinion upon which the reversal of the verdict can be based except the

portions relating to *res ipsa loquitur*. The opinion states (R. 121):

> "The court instructed the jury fully as to the doctrine of res ipsa loquitur, and this is claimed by the appellant as reversible error."

So far as the *doctrine* is concerned, it is to be noted that neither party excepted to the judge's charge, which consequently became the law of the case.

The specifications of error to be heard by this Honorable Court appear on pages 5 and 6 of the petition for the writ of certiorari. We repeat them here for ready reference. The appellate court erred—

1. In making the following ruling:

> "It is the theory of appellant that since the operation of the *switch*, which was to direct the four cars from the main line onto the siding, was in the control of Jesionowski, and that since the *instrumentality*, which was involved in the damaging accident, was not under exclusive control of appellant, the doctrine of *res ipsa loquitur* does not apply. Upon this question the trial court was most painstaking to explain that the jury should first consider whether or not the decedent was guilty of negligence, and that should they find him guiltless or at least guiltless as to any negligence contributing to the accident, the jury should then apply the doctrine of *res ipsa loquitur. This was error. The possible causal actions leading up to the fatal accident cannot be so separated.*"

2. In making the following ruling:

> "The 'thing' which caused the injury in our case was within the confines of a compound of several ele-

ments, including *the stopping of the train to begin the switching, the giving of the signals,* the throwing of the switch, *the backing of the train, the condition of the track and track bed, the switch mechanism, the car wheel flanges and other rolling stock equipment.* In this compound of elements the railroad corporation was not in exclusive control. Jesionowski was in control of important elements. In a very practical sense he, and not the corporation, was in control of very important elements, for he alone was in a position to observe; and it was his duty to observe and require the train to pull forward far enough for all of the wheels of the fourth car to clear the switch points before signaling the engineer to stop the forward movement, and the same duty continued after throwing the switch and before giving the signal to back."

3. In making the following ruling:

"The thing that caused the injury could have been Jesionowski's fault, or it could have been the railroad corporation's fault. It was the jury's duty to determine the cause of the accident, and since it must make that determination out of a set of facts wherein either one or both of the actors may have been at fault, it must do so without the aid of the doctrine of *res ipsa loquitur.*"

Points of Argument.

1. The words "instrumentalities" or "things," used interchangeably in statements of the doctrine of *res ipsa loquitur,* mean inanimate objects over which management or control can be exercised by human conduct. They do not include human conduct in and of itself.

2. Control, as that word is used in the doctrine, does not include the use or operation of the "instrumentality" or "thing" by an employee who is bound to use the "things" provided for him by his master in the performance of his duties to the master.

3. The careful or negligent use of a "thing" by an employee is a question of fact for the jury. It is one of the three things which must be determined before the rule can be applied by the jury.

4. If the jury had a right to apply the doctrine of *res ipsa loquitur*, together with all the other evidence in the case, then they were warranted in returning a plaintiff's verdict.

5. The fact that the trial judge ordered a verdict for the defendant on the first count of the complaint, under the circumstances disclosed by the record, did not create *res adjudicata* as to the second count.

Argument.

Point One.

It is evident that the decision of the appellate court rests principally, if not entirely, upon the false concept that the "thing" which caused the injury in the case at bar "was within the confines of a compound of elements." These are listed in the opinion as follows (R. 122):

(1) "the stopping of the train to begin the switching,"
(2) "the giving of the signals,"
(3) "the throwing of the switch,"
(4) "the backing of the train,"
(5) "the condition of the track and track bed,"
(6) "the switch mechanism,"
(7) "the car wheel flanges,"
(8) "other rolling stock equipment,"

No mention is made of the flying planks later found between the rails, nor of the frog.

Items 1, 2, 3, and 4 are not instrumentalities—physical, inanimate objects. Each one of these four items relates only to an act of the deceased. We can find no authority that supports the proposition that conduct, in and of itself, is a "thing" as that word is used in the definition of the doctrine of *res ipsa loquitur* as stated in the case of *San Juan Light Co.* v. *Requena,* 224 U.S. 89, at pages 98 and 99:

> ". . . when a thing which causes injury, without fault of the injured person, is shown to be under the exclusive control of the defendant, and the injury is such as in the ordinary course of things does not occur if one having such control uses proper care, it affords reasonable evidence, in the absence of an explanation, that the injury arose from the defendant's want of care."

It seems clear, upon analysis of the above definition, made intrinsically and without reference to decisions attempting to interpret the rule, that you cannot include in the word "thing," in the first line of the definition, acts of the employee in his use of the "thing." For example, the definition does not make sense if you say, "when the throwing of the switch by the deceased which causes the injury, without fault of the injured person, is shown to be under the exclusive control of the defendant"; and so, too, if any one of items 2, 3, or 4 is substituted. Nor would the substitution of "happening" or "occurrence" for the word "thing" serve the intended purpose of the doctrine, since the happening or occurrence might in some cases (and, as alleged by the defendant, in this case) prove to have been due solely to a plaintiff's negligence; in which event the thing does not speak for itself *against the defendant,* but

the evidence speaks specifically of the negligence of the plaintiff as the sole cause of his injury.

Looking at the point from the basis of legal precedent presents difficulty because the books are barren of authority in support of the thesis of the appellate court. Throughout the decisions of both state and federal courts the "thing" is consistently an "instrumentality," or an "article," or a "mechanism," or a "machine," or an "apparatus," or an "appliance." Citations in support of this statement are useless unless every case is cited, thereby excluding any precedential or text-book authority to the contrary. We can find no responsible authority which supports the concept that *conduct* is one element of the "thing."

The only section devoted by Professor Wigmore to the doctrine of *res ipsa loquitur* is section 2509, volume IX, beginning at page 377 (Third Edition, 1940). In this much cited work on evidence Wigmore heads this section: "Defective Machines, Vehicles and Apparatus." Nowhere in his article does Wigmore refer to *conduct* as a part of the doctrine. He speaks only of the control of an instrumentality, and it is clear that he is thinking of only that kind of *control* which has to do with the installation, maintenance, or repair of an instrumentality.

Again, in the extensive work of Shearman and Redfield on Negligence (Revised Edition, 1941) the text reads (p. 156): "The rule has been applied in many and various situations," and then proceeds to give specific examples of applicability and non-applicability. Many cases are cited on each side of this question, but in none of them does the "thing" involved mean conduct. "Things," it is to be concluded, are inanimate objects, capable of control by right or wrong human conduct.

Points Two and Three.

These points are related and will be considered together.

This brief contends that the words in the San Juan definition, "is shown to be under the exclusive control of the defendant," mean control by one having exclusive ownership of, or exclusive management and duty to maintain and repair, inanimate objects or "instrumentalities," and not temporary *user* control by an employee who *must* use the instrumentality in the performance of his duties to his master. Whether the temporary user control by an employee was exercised by him prudently or carelessly is, as we see it, an issue of fact, ordinarily for the jury, which must be determined antecedently in favor of a plaintiff before he can claim application of the doctrine. It is a question of behavior in the use of the instrumentality.

User Control.

User control means *behavior* by some one *using* the instrumentality. The San Juan definition clearly embodies this element, for it states: "When a thing which causes injury, *without fault of the injured person;*" etc. So the evidence must warrant a finding that the plaintiff was without fault, causative fault, and this fact must be determined *antecedently* to the application of the doctrine. It is not part of the doctrine itself. It is a fact utterly independent of the *condition* of the instrumentalities. The statement of the rule does not tolerate such a paraphrase as this: "and the injury is such as in the ordinary course of things does not occur if the one having control of the instrumentalities, *or if the injured employee who uses the instrumentality in the performance of his duty to his master,* uses proper care, it affords reasonable evidence, in the absence of an *explanation,* that the injury arose from defendant's want of care."

It seems beyond necessity of argument to affirm that the rule as stated in the San Juan case does *not* envision the negligence of a plaintiff in the *use* of an instrumentality as an element to be considered in determining whether or not the occurrence constitutes an unusual happening. For illustration, relevant both to "control" and to "unusual happening," let us assume, in the case at bar, that Jesionowski threw the switch properly in a mechanical sense, the indisputable fact upon the record, and that he threw it *after* the fourth car of the cut had passed beyond the switch points in its forward movement preparatory to backing into the north siding, and that then, having given his back-up signal, for some reason of convenience rather than necessity, he attempted to pass in front of the backward moving cars for the purpose of mounting the stirrup on the opposite side of the fourth or lead car, and that in such attempt he was run over and killed. On this set of facts could it be said that his death resulted from or had anything to do with legal causation growing out of the act of throwing the switch? And so, in the instant case, the specific negligent conduct of the deceased, relied upon by the defendant at the trial, was not in his throwing of the switch in an improper manner, but in throwing the switch at the wrong time. Both counsel for the railroad and the appellate court treated the act of throwing the switch at the wrong time as a matter of control; whereas the true act of negligence, if any, lay in decedent's failure to *observe* the position of the fourth car *when* he threw the switch. In other words, it is negligent *observation* and not negligence in operation which the jury had to decide one way or the other. The appellate court therefore clearly erred in treating the alleged act of Jesionowski as a matter of control of an instrumentality; and of course, as has been argued under point one, Jesionowski was not in control of an "instrumentality" when he directed the car movements.

Involved in this judicial error is the astounding proposition that, even if the jury found the deceased entirely faultless, nevertheless the doctrine could not be used by the jury, solely because the deceased, for a fraction of a minute, had his hands on the switch lever. Supposing Jesionowski had survived and testified flatly that the cut of cars had passed the switch points in their forward movement, and that he gave the back-up signal before the cars reached the switch in the back-up movement, and that witnesses for the defendant testified that they *saw* him throw the switch while the fourth or lead car was astride the switch points: On that state of the evidence may the trial judge say to the jury: "I am not permitted to let you pass upon the credibility of the witnesses and let you decide this issue, because Jesionowski *might possibly* have thrown the switch at the wrong time, and since he threw the switch, even though he threw it properly, you can draw no inferences against this defendant under the doctrine of *res ipsa loquitur*"? Such an instruction, if good law, would kill the doctrine in every case where a dead employee was, in the performance of his duty, using his master's instrumentality. The proposition that the issue of plaintiff's negligence in respect of "user" control is an antecedent question for the jury is supported by the recent case of *Sweeting* v. *Penn. R. Co.*, decided in the Third District May 1, 1944, 142 F. (2d) 611.

That case is a death action under the Federal Employers' Liability Act. In the District Court there was a direction of a verdict for the defendant on the grounds that *the action was attributable to the negligence of plaintiff's decedent* and that there was no negligence on the part of the defendant.

Decedent was an engine hostler engaged in moving electric locomotives from one place to another within a par-

ticular area. He was an experienced operator. He was sent to move a locomotive. After a little while there occurred at the power station evidence of an "outage" of power. The indication was that there was something wrong within the area of the "pit" where the locomotive was at rest. Two men sent out to investigate found Sweeting lying on the ground alongside the engine, which had not been moved from the pit. The clothing on the upper part of the body was in flames. He had both electric contact and flame burns, and he died six days later. Before he died, in response to the question, "How did this happen?" he replied: "I was on the electric engine pumping,—I came in contact with 11,000 volts." The report of the case goes on to explain in detail the various features of the engine, from which the jury *might* have found (as the defendant contended and tried to prove) that the deceased was killed through his own conduct in using the electrical apparatus negligently.

The court, at page 612:

> "Sweeting must be presumed to have been actually engaged in the performance of his duties and exercising due care for his own safety. Tennant, Admrx, etc., vs Peoria & Pekin Union Railway Co., 321 U.S. 29."

There follows in the opinion an analysis of the evidence relating to the question whether Sweeting was in or outside the cab when the fatal contact happened.

Continuing with the opinion:

> "From the *probabilities*, the time element, *the presumption that he was properly attending to his job with due care for his own safety*, and Sweeting's own testi-

mony, it could be inferred that he was within the locomotive cab when he was electrically shocked.

"It is true that the general rule in this type of case is that the burden of proof rests on the plaintiff to show that injury resulted from negligence on the part of the defendant. However, here, if the accident occurred in the cab, *then the very nature of the accident itself* and through the presumption it carries, supplies the requisite proof. *If Sweeting was shocked within the cab,* such accident, ordinarily speaking, would not have happened if those having control of the locomotive and of the cab, used proper care *and warrants the inference of negligence;* in other words, res ipsa loquitur."

It is evident that the court treated the question whether or not Sweeting received the shock inside the cab, and whether or not there was probability, upon all the evidence, that Sweeting handled the apparatus properly, as questions of fact for the jury. They were both antecedent. It is implicit in the opinion that, if the jury found that Sweeting was shocked while negligently trying to adjust something wrong, from the top of the engine, or was shocked through his own negligence in using the apparatus while within the cab, *res ipsa loquitur* would not be applicable; otherwise it would.

So, in the case at bar, it was an accurate statement of the law when the judge in his charge said that, if the jury found that the deceased did not throw the switch at the wrong time, then the doctrine was available to the plaintiff.

In addition to the Sweeting case there are other authorities which support our contention.

In Prosser on Torts (1941 Edition), at page 300, it is said:

"*Allied* to the condition of exclusive control in the defendant is that of absence of any action on the part of the plaintiff contributing to the accident. Its purpose, of course, is to eliminate the possibility that it was the plaintiff who was responsible. If the boiler of a locomotive explodes while the plaintiff engineer is operating it, the inference of his own negligence is at least as great as is that of the defendant, and res ipsa will not apply *until he has accounted for his own conduct.* But the requirement may easily be misunderstood. The plaintiff is seldom entirely static, and it is not necessary that he be completely inactive, *but merely that there be evidence removing the inference of his own responsibility.* If the evidence is sufficient to eliminate the plaintiff's contribution . . . the weight of modern authority is heavily in favor of the application of res ipsa loquitur to employees."

In American Jurisprudence, vol. 38, at page 997:

"The requirement that the instrumentality be under the management and control of the defendant does not mean, or is not limited to, actual physical control, but refers rather to the right of control at the time of the accident."

In *Canfley* v. *Missouri-Kansas-Texas R. Co.*, 353 Mo. 605, at page 618:

"The rule that the exclusive control and management of the *appliance* or the thing causing the injury must be shown to have been in defendant does not mean physical control but refers to the right of such control."

In *Van Horn* v. *Pacific Refining & Roofing Co.*, 27 Cal. App. 105, at page 109:

> "The rule to the effect that the exclusive control and management of the appliance causing the injury must be shown to have been in the defendant, must be taken to refer to the *right* of such control; *otherwise . . . the doctrine* of res ipsa loquitur could seldom if ever be given application."

In *Doughnut Machine Corp.* v. *Bibbey* (First Circuit), 65 F. (2d) 634, at page 635:

> "Defendant's claim that the accident was caused by the plaintiff herself inserting an iron rod into the machine was negatived by her testimony to the contrary—that the jury was fully justified in believing. *This was a pure question of fact for the jury.*"

And at page 636:

> "Under the res ipsa loquitur doctrine, it is sufficient *to make out a prima facie case* for a plaintiff to prove that he was not at fault, if that burden is on the plaintiff."

In *Osgood* v. *Los Angeles Traction Co.*, 137 Cal. 280, at page 283:

> "If the fault or negligence which was the proximate cause of the injury was attributable to some other vehicle under other and independent control, the defendant could so show, and that would be a good defense, *but the presumption of the defendant's negligence arises regardless of the fact that the injury may have been caused by some other agency.*"

In the case of *Scott* v. *The London & St. Katherine Dock Company*, 3 H. & C. 596 (1865), a leading English case, the language of the court is:

> "But where a thing is shown to be under the *management* of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the *management* use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care."

The San Juan definition is closely modeled upon the English definition. It substitutes "exclusive control" for "management," a distinction without a difference in meaning; it substitutes "injury" for "accident," but this substitution serves rather to confuse the definition than to change the meaning of the English decision. The word "injury" seems to mean "the occurrence causing the injury." But in one respect there is an addition to the English rule. The words "without fault of the injured person" are added. They do not appear in the Scott case, nor in the equally famous barrel case (*Byrne* v. *Boadle*, 3 H. & C. 722), because the plaintiffs in those cases were innocent third parties. If, in the barrel case, the defendant had alleged that the plaintiff threw rocks at the barrel, causing it to fall, and had introduced some evidence tending, if believed, to establish that fact, then indeed the court would have needed to go further and say: "Of course, if the defendant persuades the fact-finding tribunal, by a fair preponderance of the evidence, that rocks were thrown by the plaintiff which *alone* caused the barrel to fall, *then you do not reach the application of the rule.* The plaintiff's own act was the sole cause of his injury." We think that the court in the San Juan case had in mind situations

like that hypothecated above, when it added the words: "without fault of the injured person." Every reasonable consideration leads to the conclusion that this court, in the San Juan case, did not intend the new addition to relate in any way to the issue of control or management.

It cannot be doubted that Jesionowski's alleged negligence was a question of fact for the jury which the defendant was bound to prove by a fair preponderance of the evidence.

Central Vermont Ry. Co. v. *White*, 238 U.S. 507, 512.
Palmer v. *Hoffman*, 318 U.S. 109.
Sampson v. *Channell*, 110 F. (2d) 754.
Hough v. *Texas & P. R. Co.*, 100 U.S. 213, 226.
Northern Pacific R. Co. v. *Mares*, 123 U.S. 710.
Northern Pacific R. Co. v. *Amato*, 144 U.S. 465.
Washington & Georgetown R. Co. v. *Harmon's Admr.*, 147 U.S. 571, 581.
Baltimore & Ohio R. Co. v. *Groeger*, 266 U.S. 521.
Leathem Smith-Putnam Navigation Co. v. *Osby*, 79 F. (2d) 280, 283, 284 (cert. denied, 296 U.S. 653).
Rayburn v. *Penn. R. Co.*, 76 F. (2d) 505.
O'Hara v. *Central R. Co.*, 183 Fed. 739.

In *Baltimore & Potomac R.R. Co.* v. *Landrigan*, 191 U.S. 461, the trial court instructed the jury (pp. 471-472):

> "In the absence of all evidence tending to show whether the plaintiff's intestate stopped, looked and listened before attempting to cross the south track, the presumption would be that he did. But that presumption may be rebutted by circumstantial evidence, and

it is a question for the jury whether the facts and circumstances proved in this case rebut that presumption, and if they find that they do, they should find that he did not stop and look and listen, but if the circumstances fail to rebut such presumption then the jury should find that he did so stop and look and listen. In order to justify them in finding that he did *not, all the evidence tending to show that should be weightier in the minds of the jury than that tending to show the contrary.*"

To this instruction the defendant railroad took exception, and this court said (last line of page 473):

"There was no error in instructing the jury that in the absence of evidence to the contrary, there was a presumption that the deceased stopped, looked and listened. . . . The presumption is founded on a law of nature. We know of no more universal instinct than that of self preservation—none that so insistently urges to care against injury. It has its motives to exercise in the fear of pain, maiming and death. There are few presumptions, based on human feelings or experience, that have surer foundation than that expressed in the instruction objected to."

The appellate court in the case at bar said that the injury *might* have been Jesionowski's fault. That is not the true test. The test is whether or not the presumption of due care, and the evidence in the case, sufficed, as a matter of law, to make a jury issue on the question of Jesionowski's alleged negligence. A guidance for all inferior courts as to the application of this test has been furnished in no uncertain terms, in cases under the Federal Employers' Lia-

bility Act, which have been decided recently by the Supreme Court of the United States.

Tiller v. *Atlantic Coast Line R. Co.*, 318 U.S. 54.
Bailey v. *Central Vermont Ry.*, 319 U.S. 350.
Tennant v. *Peoria & Pekin Union Ry. Co.*, 321 U.S. 29.
Lavender v. *Kurn*, 90 S.C. Law. Ed. 692, 696; 66 S. Ct. 740.

And see—

Murphy v. *Boston & Maine R.R.*, 319 Mass. 413 (Mass. Adv. Sh. 1946, 459).
Gregory v. *Maine Central R.R. Co.*, 317 Mass. 636, 639.
Leet v. *Atchison, T. & S. Fe Ry. Co.*, 66 Cal. App. (2d) 413, 420.
Bimberg v. *N.P. Ry. Co.*, 217 Minn. 187, 194.
Boston & Maine v. *Cabana*, 148 F. (2d) 150, 152 (First Circuit).
Sweeting v. *Penn. R. Co.*, 142 F. (2d) 611, 614.

We now consider the record of testimony, to which, as was said in the Tennant case (*supra*), at page 34, "*must be added* the presumption that the deceased was actually engaged in the performance of those duties and exercised due care for his own safety at the time of his death."

Whitney, the engineer in charge of the locomotive involved in the fatal movement, was the only witness who testified as to the behavior of the deceased. He was called of necessity by the plaintiff. Some of the important evidence relating to Jesionowski's behavior is to be found in questions 18 to 58, inclusive, on pages 11, 12, and 13 of the record. We feel certain that from this testimony, and the use of plain common sense, the jury reasoned to its conclusion that Jesionowski did *not* throw the switch at the

wrong time, somewhat as follows: Jesionowski cut the fourth from the fifth car as the train stood still on the main line facing toward Boston. He then signaled the engineer from the ground to go ahead, immediately thereafter mounting the stirrup at the rear end of the fourth car on the north or engineer's side. There he rode forward with the cut until *he was opposite the switch.*

Whitney, R. 12:

> "The Court. When he went to the switch did he go forward or backward?
>
> "The Witness. Simply opposite from where he was.
>
> "The Court. He was opposite the switch and he went sideways toward the switch?
>
> "The Witness. Yes.
>
> "Q. [By Mr. O'Brien.] That is, you mean he walked at right angles from the north-bound main to the switch? A. Yes."

Would a rational mind, considering the above testimony, which is all there was on this point, say that the fourth car stopped before it reached the switch points and that Jesionowski then, with the cars standing motionless, got off the rear stirrup and walked diagonally *forward* to the switch, passing the rear half of the fourth car? And that he then threw the switch without realizing that the fourth freight car had not cleared the switch points? We do not agree with that proposition. The jury did not agree. We think that the trial judge was skeptical about it, for he charged (R. 105):

> "If he did what the defendant says he did, *it was an unusual thing to do* and you would have a right to consider his experience in handling switches in determining whether or not he actually threw the switch before all the cars passed over it."

There is one more significant thing in the record relating to the time when Jesionowski threw the switch. The engineer, Whitney, testified that, from the place where he started to back-up, the cut of cars moved 120 feet when he saw splinters of plank flying and there was a derailment (R. 13). Now, if the derailment occurred at the frog, 75½ feet to the east of the switch points (R. 36), an alternative which the jury had a right to consider, and the cut of cars had already traveled 120 feet before the derailment, it is mathematically certain that the fourth car had passed 45 feet to the west of the switch points in the forward movement. On this hypothesis it is not reasonable to believe that Jesionowski waited until the fourth car, in the back-up movement, had traveled more than 45 feet before he threw the switch, nor that he threw it at a moment when the fourth car was *moving* backward over the switch points.

If the foregoing, plus the presumption of due care, stood alone for the consideration of the jury, we think that no court would be warranted in disturbing the jury's finding that the deceased was not negligent, a finding implicit in the jury's verdict because of the painstaking care with which the judge charged the jury on the question of Jesionowski's negligence.

The only evidence to support the defendant's plea that the deceased's death was solely caused by his own act consisted of testimony as to certain distances and the length of the engine and cut of four cars. It was evidence intended to support a refined mathematical calculation. The testimony came entirely from two witnesses, the locomotive engineer, Whitney, and the civil engineer, Harvey, both defendant's employees. This evidence indicates point "A" on Exhibit 1 as the point where the *front* of the engine was at rest just before the back-up movement began (R. 22). Harvey testified that by his own measurement point "A" was 224 feet westerly of the switch points (R. 35). Be-

cause of its importance we quote, with comment, the significant parts of the testimony of these two witnesses:

On direct examination Whitney testified (R. 11):

"Q. 30. When next did you see him? A. I took his go-ahead motion and started along.

"Q. 31. Yes. A. And *about* the point that we got up to the switch I started looking back for more motions."

On cross-examination by Mr. Garland the following occurred (R. 22):

"Q. 195. And when you stopped in response to that lantern signal was the front of your locomotive at a switch point or cross-over near the Saugus River where I am pointing on the plan? A. It was.

"Mr. Garland. Now may I make a mark on that 'A'?

"The Court. Yes.

"Q. 196. In other words, I am marking the letter 'A' at the point near the Saugus River where you say the *front* of your locomotive stopped after you had received a lantern signal from Mr. Jesionowski, is that right? A. That is right.

"Q. 197. Was the length of your locomotive *between* 71 and 80 feet? A. *Around* 80 feet.

"Q. 198. And were those freight cars *about* 40 feet? A. Yes.

"Q. 199. And was the space between every two cars for coupling purposes *about* 18 inches? A. *About* that.

"Q. 200. Now, after you had received the signal from Jesionowski to stop you stopped, you say, at a point where the 'A' is on the plan? A. Yes."

On direct and redirect examination (R. 30) Whitney testified that the "nose" of his locomotive was at the switch "B" when he came to a stop after the derailment, and that the total movement of the train from west to east in the backing movement was 135 feet (R. 29). But thereafter, in a series of redirect and recross-examinations, the following occurred (R. 30, 31, 32):

Recross-examination by Mr. Garland:

"Q. 269. Now as a matter of fact the *front* of your locomotive when you stopped was at that switch point marked 'B,' wasn't it?

"A. It was.

. . . . . .

"Q. 271. Now you say your locomotive was 75 to 80 feet long,—*I will call it 80 feet?* A. That is right.

"Q. 272. And the cars were 40 feet long each? A. That is right.

"Q. 273. And there were four cars? A. Yes.

"Q. 274. Well, if you had four cars 40 feet long, that would make 160 feet, plus the locomotive 80 feet, plus the space between the cars for the coupling, you would have backed 246 feet *if you estimate that way*, wouldn't you? A. I think so.

. . . . . .

"The Court. You tell us *what you figured out in your mind* so as to settle this thing. You take a piece of paper and pencil. I understand you are putting down on this paper what you figure in your mind before you answer the question.

"The Witness. Yes, sir.

"Q. 275. [By Mr. Garland.] Now put down 80 feet for the locomotive.

"The Court. Don't tell him. Let him tell us.

"Mr. Garland. All right.

"The Witness (figuring on paper). I make it 246 feet.

"Q. 276. [By Mr. Garland.] That is what I make it. You have put down locomotive 80 feet? A. That is right.

"Q. 277. Four cars, 40 feet each, that is 160 feet, then you have written down here 6 feet for the draw bar, totalling 246 feet? A. That is right."

Redirect examination by Mr. O'Brien:

"Q. 278. So when you told us you moved 135 feet, that was not correct? A. I should say yes.

"Q. 279. That it is correct? A. Yes.

. . . . . .

"Q. 281. You moved 135 feet? A. Yes."

Recross-examination by Mr. Garland:

"Q. 282. You figured the length of the cars and the length of the locomotive? A. Yes.

"Q. 283. And the space between the cars, the couplings? A. Yes.

"Q. 284. And you told us where the head of the locomotive stopped? A. Yes.

"Q. 285. Well, all right. And the other estimate of 135 feet is just a mere guess? A. Yes."

Redirect examination by Mr. O'Brien:

"Q. 286. And some of the other measurements that you have given us are guesses, are they not? You have been guessing about this, you didn't make any measurements? A. No, I did not.

"Q. 287. You have been guessing about them? A. Yes.

. . . . . .

"The Court. I think it is hardly fair. Was it your best recollection?

"The Witness. *All I had was two switch points for marks.*

. . . . . .

"The Court. *And you made no pretension of being accurate.*

"The Witness. *No.*"

The civil engineer Harvey, called by defendant, testified as to surveys and measurements made by him from which he drew Exhibit 1. On direct examination by Mr. Garland, Harvey was not asked a single question as to the length of the train. But on cross-examination he testified that he had measured the fourth car and found the length of it from knuckle to knuckle to be 44 feet 9 inches (R. 43, 44), not 40 feet as testified to by the witness Whitney; and the space occupied by the coupling apparatus between two cars 2 feet 6 inches (R. 44), not 18 inches as shown by Whitney's testimony. Harvey further testified on cross-examination (R. 44):

"Q. 101. . . . What is the measurement of the next car to the fourth? A. I don't know.

"Q. 102. Didn't you get any information on that? A. No, sir, I don't even know the number.

"Q. 103. Did you get it on the next car? A. No, sir.

"Q. 104. Did you get it on any other car but the fourth car? A. No, sir.

. . . . . .

"Q. 106. Where did you get the measurement [of the fourth car]? A. From the company record of this particular car.

"Q. 107. Did you ask for any record on the other cars? A. No, sir.

"Q. 108. Do you know whether the other cars were 60-foot cars or 35-foot cars or 40-foot cars? A. I don't know anything about it."

He also testified that the distance between the nearest wheels of one set of trucks of the fourth car to the other set of trucks was 25 feet 9 inches (R. 42), and that the length of the switch-point rails, terminating in tips at switch "B," was 15 feet (R. 37); so that in calculating a distance of backward train movement or of the length of the train there would be a tolerance for error of only 10 feet 9 inches.

The foregoing constitutes all of the evidence presented to the jury as a basis for calculation of the length of the train. It is submitted that this evidence would leave not only a layman's rational mind but also the mind of a trained mathematician imbedded in a morass of speculation.

The critical figure in defendant's straddle theory is 246 feet. Upon analysis it will be found that, if this distance is wrong, either too long or too short, by more than 10 feet 9 inches, the theory is defeated. Whitney only guessed at the length of the engine and cars. He guessed that each car was 40 feet long and that the space between cars was only 18 inches (R. 30, 31, 32). Harvey testified from measurements furnished him by the railroad. He said that the space between cars was 2 feet 6 inches instead of 18 inches, as testified to by Whitney. He also testified that the length of the fourth car, from knuckle to knuckle, was 44 feet 9 inches (R. 44). It is clear that Whitney and Harvey sharply disagreed, and the jury could not find

from the testimony of these witnesses what the true length of the cut of four cars and the engine was. Harvey did not ask the defendant for a record of the other three cars. He had no knowledge of their lengths (R. 44).

Point Four.

The defendant made no pretense that the injury was caused by an act of God or by the intervention of a third party.

The San Juan definition states three distinct prerequisites to be determined antecedently to the right of a jury to use the rule. They are—

1. That the plaintiff be without fault.
2. That the instrumentality which caused the injury be in the exclusive control of the defendant.
3. That the injury (better happening) is such as in the ordinary course of things does not occur if the one having such control uses proper care.

As to No. 1: This is a pure question of fact for the jury. In the case at bar the defendant undertook to prove that the deceased's own act was the sole cause of his death. The burden was on the defendant to persuade the jury, by a fair preponderance of the evidence, that this was true. The jury found the deceased to have been without fault.

As to No. 2: Ordinarily this too would be a question of fact; but the appellate court has ruled, as a matter of law, that the record shows that the defendant was not in exclusive control of the instrumentalities involved. We have argued that that ruling was erroneous. If we are right, then the ruling took away the plaintiff's verdict without warrant in law.

As to No. 3: If the brief is correct as to prerequisites Nos. 1 and 2 above, and if the jury had a right to find that the occurrence was an extraordinary one within the meaning of the San Juan doctrine, then the jury had a right to find the defendant guilty of causative negligence by taking the applicable doctrine as a presumption, or as constituting a prima-facie case, or as a basis for an inference, considered along with all the other evidence in the case. The appellate court did not reach this vital question, unless it can be said that this issue was disposed of in that paragraph of the opinion which we have assigned as the third specification of error. (The brief treats of the third specification a little later.)

If it was permissible for the jury to find, under the instructions of the trial judge, which were not excepted to, that the occurrence was an extraordinary one, and if the jury found the defendant's explanations unsatisfactory, as they did, then the occurrence or derailment in this case afforded "reasonable evidence that the injury arose from the defendant's want of care." This principle is stated in 38 American Jurisprudence, at page 1007, as follows:

> "According to most authorities the presumption or inference arising from the res ipsa loquitur doctrine constitutes evidence sufficient to take the case to the jury, even though the defendant introduces evidence which, if true, would be sufficient to rebut the presumption or inference of negligence."

There are many cases which suggest that no inference of negligence can be drawn from the happening of the accident alone; that there must be some attendant circumstance or circumstances which light up the incident and point to negligence on the part of someone. But that is not the law, as we all know, in passenger cases. In those

cases the derailment itself establishes a prima-facie case. We believe that there should be no distinction made between passenger cases and an employee case like the one at bar, providing prerequisites Nos. 1 and 2 are first satisfied. We think that this viewpoint is confirmed by the trend of decisions in cases under the Federal Employers' Liability Act.

In *Cachrane* v. *Pittsburgh*, 31 F. (2d) 769, a derailment case, it is said at page 773:

> "The Federal Employers' Liability Act supplemented by the Safety Appliance Act has entirely changed the situation. Now an employee of an interstate carrier . . . is entitled to recover as broadly as an interstate passenger. The differences are very slight, and such as do exist are probably in favor of the employee."

And see—

McNamara v. *Boston & Maine R.R.*, 202 Mass. 491.

Leet v. *Union Pacific R. Co.*, 144 P. (2d) 64.

The derailment in the case at bar ought to be sufficient, of itself, to raise a presumption in favor of the plaintiff or to permit an inference of negligence on the part of the defendant.

However, if we *must* have "surrounding circumstances" in order to characterize the incident as an extraordinary occurrence, we think they sufficiently appear in the record. If the derailment occurred at the switch, is it not remarkable that this happened despite the facts that the switch was thrown in a proper manner and at the right time? Or, if the derailment occurred at or near the frog, is it not remarkable that there were planks between the rails near

the frog? (R. 13, 18). Is it not remarkable that there were marks of wheel flanges on top of the rails 6 or 7 feet west of the frog, and somewhere near where the planks were found between the rails? (R. 76). Is it not possible that the front wheels of the fourth or lead car, in the backward movement, first hit the planks, rode on them in such a way that the front wheels took the main line, but yet displaced them so that the next two trucks, on the fourth and third cars, went off the rails and were thrown astride the north rail of the north siding? (R. 57). A witness for the defendant testified that a derailment could occur if the spring frog failed to open because of worn wheel flanges. Would such an event suggest an ordinary occurrence? And there is the body of the deceased beneath the truck of the third car (R. 15). There was no evidence that it had been dragged. How did it get there? There were things wrong with the frog. Were they all the result and not some of them the cause of the derailment? These were all matters for the jury's consideration. Can it be ruled, as a matter of law, that they do not constitute the necessary "surrounding circumstances," if such circumstances are needed in the plaintiff's proof? There is no direct evidence to show that the front wheels of the fourth car took the main line at the switch.

Engineer Whitney (R. 15):

"Q. [By Mr. O'Brien.] What did you find? A. I found one end of the car had gone back down the main line.

"Q. You found it was *on* the main line? A. Yes.

"Mr. O'Brien. I ask that be struck out, 'had gone back'.

"The Court. Yes.

"Q. You *found* one end of the car on the main line? A. That is right."

We submit that the derailment under the "surrounding circumstances" disclosed in this record furnished ample ground for a jury to find that the occurrence was one that does not happen in the ordinary course of things.

Counsel have been frustrated in repeated attempts to get at the meaning of that paragraph of the opinion of the appellate court which constitutes our third specification of error (Petition, p. 6). We have been unable to discover in that paragraph any relationship between the concepts therein stated and the doctrine of *res ipsa loquitur*. Indeed, it contravenes the doctrine. In the rule, the question of Jesionowski's participation in his injury is a question of fact for the jury. They are to find, not whether he *might* have been at fault—an issue of speculative possibility not of probability—but whether in *fact he was at fault*. Once that issue is decided in the deceased's favor, there is nothing left to be shown as to his fault. Certainly the language of the doctrine in the Requena case cannot be distorted to read: "The doctrine cannot be applied if the injury *might* have been the fault of the injured party." The practical results of the concepts set out in this third specification of error would be to deny the applicability of the doctrine, in every case where there was no proof available to the representative of the estate of the dead employee, of any specific cause of a derailment. In effect the appellate court say that in a true *res ipsa loquitur* case the doctrine cannot be applied.

Point Five.

The respondent's contention that counts 1 and 2 of the complaint were identical, and that therefore the directed verdict on the first count precluded recovery on the second count because the issues had become *res adjudicata*, made

its first appearance in appellant's opening brief on appeal (R. 121). The appellate court remarked (R. 121): "We refuse to consider the point made but as to its merits see Romana v. Boston Elec. Ry., 226 Mass. 532, 536," a case cited in the brief in behalf of the appellee in the Circuit Court. We believe this question was not saved to the appellant in its appeal to the Circuit Court of Appeals. We also fail to see substantial merit in the point raised.

Conclusion.

We respectfully submit that the rule in the Requena case should be interpreted as set forth in this brief; that is, that the doctrine in its entirety requires three distinct antecedents before the rule itself becomes applicable. We prefer this sequence: 1. The occurrence is of the kind that does not happen in the ordinary course of human events if the one having control of the causative instrumentality uses proper care (properly a jury question). 2. The instrumentality, an inanimate object, must be under the exclusive *management* of the party to be charged with negligence. The *use* of the instrumentality by the servant falls not within the sphere of the management control prerequisite, but rather is entirely included in the third antecedent. 3. The injured party must be found by the jury to have been guiltless of either contributory or solely causative negligence, and the burden of showing negligence in the injured party is upon the defendant who asserts such negligence and is to be satisfied by a fair preponderance of the evidence.

It is therefore respectfully submitted that the plaintiff's verdict in the District Court ought to be restored to her, with interest from the date of the verdict to the date of the final judgment in the District Court entered upon the man-

date of this court; together with legal costs which have accrued to the complainant in the District Court, in the Circuit Court of Appeals, and in this Honorable Court.

THOMAS C. O'BRIEN,
J. EDWARD KEEFE, JR.,
Attorneys for the Petitioner.

Of Counsel:
JOHN S. STONE.

FILE COPY

MAY 10 1946
CHARLES ELMORE CROPLEY

Supreme Court of the United States.

OCTOBER TERM, 1945.

No. 1129.

HELENE A. JESIONOWSKI, ADMINISTRATRIX,
Petitioner,

v.

BOSTON AND MAINE RAILROAD.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

FRANCIS P. GARLAND,
Attorney for Respondent.

Of Counsel:
HURLBURT, JONES, HALL & BICKFORD.

ADDISON C. GETCHELL & SON, LAW PRINTERS, BOSTON.

Subject Index.

	Page
Opinion below	1
Jurisdiction	1
Statement of the case	2
Statement of facts	4
Question presented	8
Argument	9
The Circuit Court of Appeals was not in error in ruling that the doctrine of res ipsa loquitur was not applicable to the facts of this case	9
Conclusion	43

Table of Authorities Cited.

Cases.

Arabia v. John Hancock Mut. Life Ins. Co., 301 Mass. 397	17
Asprodites v. Standard Fruit & S.S. Co., 108 Fed. (2) 728	14
Atchison, T. & S.F. Ry. Co. v. Toops, 281 U.S. 351	9
Baltimore & Ohio R. Co. v. Berry, 286 U.S. 272	9, 37
Bonner v. Texas Co., 89 Fed. (2) 291	13, 15
Cantley v. M., K., T. R.R. Co., 353 Mo. 605	35
Chicago, M. & St. P. Ry. v. Coogan, 271 U.S. 472	9, 41
Conn. Mutual Life Ins. Co. v. Hillmon, 188 U.S. 208	31, 32
Courtney v. N.Y., N.H. & H. R.R., 213 Fed. 388	14, 17, 18
Curtin v. Boston Elevated Ry., 194 Mass. 260	12, 29
Doughnut Machine Co. v. Bibbey, 65 Fed. (2) 635	35
Dryden v. Western Pacific R. Co., 1 Cal. App. (2) 49	14
Dunbar v. Ferrara Bros. Inc., 306 Mass. 90	16
Francey v. Rutland R.R. Co., 222 N.Y. 482	17, 19, 39
Gilchrist v. Boston Elevated Ry., 272 Mass. 346	12
Ginzler v. Birmingham, 6 Ala. App. 666	31

Page

Graham v. Badger, 164 Mass. 42 35
Gray v. Baltimore & Ohio R. Co., 24 Fed. (2) 671 13, 15
Henson v. *Lehigh Valley R.R. Co.*, 194 N.Y. 205 14, 28
Kay v. Metropolitan St. Ry. Co., 163 N.Y. 447 11
Keogh v. South Buffalo Ry. Co., 233 N.Y. 31 28
Kid v. Coahuila Lead & Zinc Co., 204 S.W. 284 17, 21
Klingman v. Loew's Inc., 296 N.W. 528 17, 21
Lennon v. Rawitzer, 57 Conn. 583 14, 16
Lockwood, Admr., v. Chicago &c. Ry. Co., 55 Wis. 50 28
Lonergan v. American Ry. Ex. Co., 250 Mass. 30 14
Looney v. Metropolitan R. Co., 200 U.S. 480 9
Lynch v. N.Y., N.H. & H. R.R., 294 Mass. 152 9, 10, 12, 14, 17, 28
Massa v. Nippon Yusen Kaisha, 264 N.Y. 283 14, 15, 17, 19
McCabe v. Boston Consol. Gas Co., 314 Mass. 493 10
Minihan v. Boston Elevated Ry., 197 Mass. 367 10
Minneapolis & St. Louis R.R. Co. v. Gotschall, 244 U.S. 66 12
Mucha v. Northeastern Crushed Stone Co., Inc., 307 Mass. 592 29, 30, 41
New York Central R. Co. v. Ambrose, 280 U.S. 486 17, 18, 29, 40
Papageorge v. Boston & Maine R.R., 317 Mass. 235 40, 41
Patton v. Texas & Pacific Ry. Co., 179 U.S. 658 9, 12, 17, 25, 26, 29, 41
Payne v. Boucher, 270 Fed. 38 9, 25, 41
Peirson v. Boston Elevated Ry., 191 Mass. 223 31, 32
Pekin Wood Products Co. v. Burkhardt, 192 Ark. 1025 14
Pennsylvania R. Co. v. Chamberlain, 288 U.S. 333 9, 10, 29, 37, 41
Peterson v. Boston & Maine R.R., 310 Mass. 45 40
Pittsley v. Allen, 297 Mass. 83 14
Plumb v. Richmond, L. & R.R. Co., 233 N.Y. 285 13

Page

Prondecka v. Turners Falls Power & Elec. Co., 238 Mass. 239 17
Rayburn v. Penn. R. Co., 76 Fed. (2) 505 35
Reading Co. v. Boyer, 6 Fed. (2) 185 9
Reardon v. Boston Elevated Ry., 247 Mass. 124 14
Robertson v. Chicago &c. Ry. Co., 225 N.W. 160 9, 28, 29, 30, 41
San Juan Light & Transit Co. v. Requena, 224 U.S. 89 10, 11, 13, 14
Santa Maria v. Trotto, 297 Mass. 442 17
S. E. Rand Transportation Co. v. Boston & Maine R.R., 273 Mass. 327 16
Showalter v. Western Pacific R. Co., 16 Cal. (2) 460 29
St. Louis &c. Ry. v. Mills, 271 U.S. 344 9, 37
Sweeney v. Erving, 228 U.S. 233 10, 11, 37
Terminal R. Assn. of St. Louis v. Staengel, 122 F. (2) 271 28
Texas & Pacific Ry. Co. v. Barrett, 166 U.S. 617 12
Texas & Pacific Coal Co. v. Kowsikowski, 103 Tex. 173 14, 17, 20, 27, 34, 36
Tiller v. Atlantic Coast Line R. Co., 318 U.S. 54 9
United States v. Porter Bros. & Biffle, 95 Fed. (2) 694 13, 15, 25
Van Horn v. Pacific Refining & Roofing Co., 27 Cal. App. 105 34
Warner v. Railroad, 178 Mo. 125 41
Wright v. South Counties Gas Co., 102 Cal. App. 656 34

STATUTES.

Federal Employers' Liability Act, 45 U.S.C. c. 2, sec. 51 seq. 1, 2, 9
Judicial Code, sec. 240(a) as amended by Act of Feb. 13, 1925, 28 U.S.C. sec. 347 1
28 U.S.C. sec. 225 1

TEXTBOOKS.

	Page
Prosser on Torts (1941 Ed.) p. 300	36
1 Shearman & Redfield, Negligence (Rev. Ed.) sec. 56	10, 11, 12, 13, 25

Supreme Court of the United States.

OCTOBER TERM, 1945.

No. 1129.

HELENE A. JESIONOWSKI, ADMINISTRATRIX,
Petitioner,
v.
BOSTON AND MAINE RAILROAD.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Opinion Below.

The opinion of the Circuit Court of Appeals for the First Circuit, which is not yet reported, appears in the record at pages 119-123.

Jurisdiction.

The District Court of the United States had jurisdiction of the cause of action under the Federal Employers' Liability Act, U.S.C. Title 45, c. 2, §§ 51 *seq.*; the Circuit Court of Appeals had appellate jurisdiction to review by appeal the final decision of the District Court under U.S.C. Title 28, § 225, and this court has jurisdiction under U.S.C. Title 28, § 347 (Judicial Code, § 240 (a), as amended by the Act of February 13, 1925).

Statement of the Case.

This is an action of tort brought under the provisions of an Act of Congress approved April 22, 1908, entitled "An Act Relating to the Liability of Common Carriers by Railroad to Their Employees in Certain Cases" (U.S.C. Title 45, §§ 51 *seq.*), as amended, for the death of an employee of the defendant, the plaintiff's intestate, on July 1, 1944, while he was engaged in a switching operation in the defendant's freight yards near Lynn, Massachusetts (R. pp. 1-3, 4-5).

Hereinafter the petitioner, Helene A. Jesionowski, Administratrix, will be referred to as the plaintiff, and the respondent, Boston and Maine Railroad, will be referred to as the defendant.

The writ was filed October 18, 1944 (R. p. 1).

The complaint (R. pp. 1-3, 4-5) contains two counts. The first count alleges in substance that on July 1, 1944, while the plaintiff's decedent was employed as a brakeman on a train of the defendant at Lynn, Massachusetts, it became his duty to take part in a switching operation, which required him to ride upon a freight car which was one of a string of freight cars which was being pushed in upon a siding by a locomotive of the defendant; that by reason of a defect or insufficiency, due to the negligence of the defendant, in its car, track, or roadbed, the car upon which the plaintiff's decedent was riding was derailed, and as a result of the derailment the decedent was thrown from the car upon which he was riding under its wheels and instantly killed. The second count, added by amendment (R. pp. 4-5), alleges in substance that the decedent's death resulted from the derailment of the car upon which he was riding, and that the derailment resulted from negligence of the defendant, without specifying any particular negligence.

The defendant's answer appears at pages 3-4, 5-6 of the record.

The case was tried before Ford, J., and a jury on May 1 and 2, 1945 (R. p. 6), in the District Court of the United States for the District of Massachusetts.

At the close of the evidence the defendant duly and seasonably filed a motion for a directed verdict on each count (R. pp. 6-8). This motion was allowed on the first count and denied on the second count (R. pp. 6, 97), and the defendant's exception was saved (R. p. 97).

The defendant duly and seasonably requested the court to give certain instructions to the jury (R. p. 113), among which are the following:

> "6. The doctrine of *res ipsa loquitur* is not applicable to the facts of this case.
>
> "7. The plaintiff's intestate had control of the switch at the time of the accident.
>
> "14. There is no evidence which would warrant a finding that the derailment was due to negligence of the defendant."

These instructions the court refused to give, and to this refusal the defendant duly excepted (R. p. 109).

On the first count of the complaint the jury returned a verdict for the defendant by direction of the court (R. pp. 6, 9, 97-98), and judgment for the defendant was entered on this count (R. p. 9). On the second count of the complaint the jury returned a verdict for the plaintiff in the sum of $20,000 (R. p. 9), and judgment was entered for the plaintiff on the second count in this sum with costs (R. p. 9).

From the judgment for the plaintiff on the second count the defendant claimed an appeal to the Circuit Court of Appeals for the First Circuit (R. pp. 9, 114), and on April 1, 1946, the Circuit Court of Appeals for the First Circuit reversed the judgment of the District Court; and judgment for the defendant was entered (R. p. 123).

Statement of Facts.

The only eye-witness to the accident was Harrison I. Whitney, who was called as a witness by the plaintiff (R. p. 10). At the trial Whitney testified that he was a locomotive engineer employed by the Boston and Maine Railroad; that he recalled that there was an accident about 5.30 in the morning on July 1, 1944, which was a clear day; that after he went by West Lynn he brought the train, with forty-nine cars, to a stop (R. p. 10); that Jesionowski was the brakeman, and he went back to cut off four cars; that he had been riding with the witness in the cab of the engine up to that point; that after a time he (the witness) got the go-ahead motion by lantern and started along (R. p. 11); that he continued to go ahead towards the Saugus River until he got from Jesionowski a lantern signal to stop (R. pp. 11-12, 22); that when he stopped in response to that lantern signal the front of his locomotive was at a switch point or cross-over near the Saugus River, marked "A" on a plan (R. p. 22) introduced in evidence and marked "Exhibit 1" (R. pp. 49, 111); that he then saw Jesionowski go towards the switch stand (R. pp. 12, 23); that the switch stand was at a point on the plan marked "B"; that when Jesionowski came from that point back toward the car he (the witness) got a signal to back, and he started backing (R. pp. 12, 23); that he next saw Jesionowski on the side of one of the freight cars and he (Jesionowski) gave a second signal to back (R. pp.

13, 23); that he (the witness) had already started backing by the time he got the second signal from Jesionowski; that in making his movements forward, in stopping, and in backing, he relied on the signals which he got from Jesionowski (R. p. 23); that he had backed about three car lengths when he saw splinters going in the air (R. pp. 13, 23); that he then stopped the locomotive within 15 or 20 feet (R. p. 15), and went across the cab to look out on the fireman's side and saw that the cars were in a U-shape; that he immediately went back on the north side to see what had taken place and found one end of the car was on the main line and the other on the north siding, so there was a derailment of that fourth car from the engine (R. pp. 15, 25-26); that he examined the switch (R. p. 16), and observed that the switch was set for the north siding (R. p. 17), and with reference to the switch stand he observed that the handle was down and the lock was in place but not locked; that that was the customary thing because the brakeman (Jesionowski) was going to let him out and then throw the switch again later (R. pp. 17-18); that on the day before he had used the same switch and it worked properly, and on the next day he operated a train over it and it worked properly then (R. p. 20). The witness further testified (R. p. 22) that the length of the locomotive was about 80 feet; that these freight cars were about 40 feet, with a space between the cars for coupling purposes about 18 inches (R. p. 22); that the total length of the train was about 246 feet (R. p. 31); that when he finally stopped after the derailment, the front of the locomotive was near the switch stand, which is marked "B" on the plan (Exhibit 1, R. p. 111) (R. p. 24); that he was backing the train about 5 miles an hour (R. pp. 14, 26).

Earl M. Harvey, called by the defendant (R. p. 33), testified (R. p. 33) that he was a civil engineer for the Boston

and Maine Railroad; that the plan (Exhibit 1, R. p. 111) was made by him, based upon measurements and a survey which he personally made (R. p. 34); that the frog to the left or towards Lynn from the switch point marked "B" is 75½ feet from the point marked "B" (R. p. 36); that the switch point, operated by means of the switching device (R. p. 39), was 15 feet long (R. pp. 37, 38, 40); that the rear car of the string of four cars was 44 feet 9 inches from the end of one knuckle to the other knuckle (R. pp. 43, 44), and the shortest distance between the wheels, on car No. 72643 (the car which was derailed), from truck to truck, was 25 feet 9 inches (R. p. 42); that the distance between the cross-over marked "A" on the plan (Exhibit 1, R. p. 111) and the switch point marked "B" on the plan is 224 feet, and that was based on his measurements (R. p. 35).

John F. Sweeney, the defendant's trainmaster (R. p. 62), testified (R. p. 62) that on the morning of the accident in which Mr. Jesionowski was involved he went to the scene of the accident, and arrived there about 6.20; that he found the rear truck of the leading car, as it was backed, was on the west-bound main track; that the leading truck was not derailed (R. p. 63); that the trucks of that car nearest the engine were derailed (R. p. 63); that he noticed some flange marks on the ties, which commenced 6 or 8 feet west of the frog (R. p. 66); that he had examined a couple of hundred derailments, and he had never known of one being caused by a spring frog (R. p. 69); that he operated the switch both ways, and found that it operated perfectly; that he observed the condition of the roadbed and track, and it seemed all right (R. p. 67).

Francis T. Flynn, the defendant's assistant division engineer (R. p. 72), testified (R. p. 73) that when he got there on the morning of the accident he saw that the lead

trucks of the first car towards Lynn were on the westbound tracks and the rear trucks of that car were on the inside of the north rail of the north siding, and the first trucks of the next car were also derailed inside the south rail of the north siding (R. p. 73); that as a result of seeing these cars there he went to the switch stand, indicated on the plan near "B" (Exhibit 1, R. p. 111); that it was a hand switch; that he took the switch stand and threw the lever to open up the line to see whether the switch points fitted close to the stock rail and he found that in both cases they did (R. p. 75); that the switch points were 15 feet long (R. p. 75); that he found the tip of the switch point was close against the main-line track; that he then tried it on the side track and threw the switch back to its original position and it fitted again; that he found when he threw the switch back and forth that it worked all right (R. p. 75); that he could not find any derailment marks on the main line, so he went down on the side track and found wheel marks on the top of the rail at a distance of 69 feet from the switch point marked "B," going towards Lynn, on the switch-point side of the frog; that he traced those marks and found they continued 170 feet from the first mark 69 feet from the switch point (R. pp. 76-77), which would be about 6½ feet before you reached the frog going from the point of the switch (R. p. 83); that the two front bolts on the frog were damaged and the spring bolt was dented (R. p. 83); that the wheels when they became derailed passed over and made marks where they passed over the bolt or spring and continued on to the marks beyond it; that the wheels of the car clipped the bolt heads (R. p. 85).

John F. Brady, a section foreman for the Boston and Maine Railroad (R. p. 91), testified (R. pp. 91-92) that he went to the scene of the accident on the morning it hap-

pened; that the first thing he did was to examine the switch; that he moved it himself and found the operation of the switch "was O.K."; that the points of the switch all fitted close to the stock rail; that no repairs to that switch had been made after the accident.

Leonard A. Casey, the defendant's track supervisor (R. p. 93), testified (R. p. 94) that he went to the scene of the accident on the morning the accident happened; that the first thing he did was to go to the switch stand and make a check on it; that he threw the switch back and forth and left it in its normal position; that he found the condition of the switch "was 100%, in very good shape" (R. p. 94); that he went to work and checked the roadbed and also the track; that 6 to 8 feet ahead of the point of the frog he found a mark on the rails and also some marks on the ties; that that mark continued right along the side track for quite a little distance (R. p. 94); that the only damage he found on the frog was right at the joint where it locks into the running rail; two of the plates were marked there; that there was a nick on the top of the nut, a flange mark, and the mark continued on and hit the spring of the frog, which is the bolt that goes through the frog, and bent that (R. p. 95).

Question Presented.

The plaintiff's specifications of errors (Petition, pp. 5 and 6) raise one fundamental question:

WAS THE CIRCUIT COURT OF APPEALS IN ERROR IN RULING THAT THE DOCTRINE OF RES IPSA LOQUITUR WAS NOT APPLICABLE TO THE FACTS OF THIS CASE?

Argument.

THE CIRCUIT COURT OF APPEALS WAS NOT IN ERROR IN RULING THAT THE DOCTRINE OF RES IPSA LOQUITUR WAS NOT APPLICABLE TO THE FACTS OF THIS CASE.

I. Under the Federal Employers' Liability Act (U.S.C. Title 45, c. 2, § 51) liability arises from negligence, and that negligence must be the cause of the injury.

Tiller v. *Atlantic Coast Line R. Co.*, 318 U.S. 54, 67.
Atchison, T. & S.F. Ry. Co. v. *Toops*, 281 U.S. 351, 354-355.
Baltimore & Ohio R. Co. v. *Berry*, 286 U.S. 272, 276.

And the burden of proving negligence is on the plaintiff.

Pennsylvania R. Co. v. *Chamberlain*, 288 U.S. 333, 343.
Baltimore & Ohio R. Co. v. *Berry*, 286 U.S. 272, 276.
St. Louis &c. Ry. v. *Mills*, 271 U.S. 344, 347.
Looney v. *Metropolitan R. Co.*, 200 U.S. 480, 487-488.
Chicago, M. & St. P. Ry. v. *Coogan*, 271 U.S. 472, 478.
Patton v. *Texas & Pacific Ry. Co.*, 179 U.S. 658, 663.
Reading Co. v. *Boyer*, 6 Fed. (2) 185, 186.
Payne v. *Boucher*, 270 Fed. 38, 40.
Lynch v. *N.Y., N.H. & H. R.R.*, 294 Mass. 152, 161.
Robertson v. *Chicago &c. Ry. Co.*, 225 N.W. 160, 161-162 (Minn.).

A mere scintilla of evidence is not sufficient.

Pennsylvania R. Co. v. *Chamberlain*, 288 U.S. 333, 343.

II. Since there was no direct evidence of negligence, the plaintiff invokes the doctrine of *res ipsa loquitur*.

1. This doctrine has been defined in a number of cases.

Sweeney v. *Erving*, 228 U.S. 233, 240.
San Juan Light & Transit Co. v. *Requena*, 224 U.S. 89, 98-99.
McCabe v. *Boston Consol. Gas Co.*, 314 Mass. 493, 496.
Lynch v. *N.Y., N.H. & H. R.R.*, 294 Mass. 152.
Minihan v. *Boston Elevated Ry.*, 197 Mass. 367.
1 Shearman & Redfield, Negligence (Rev. Ed.) pp. 150, 152, § 56.

In *Sweeney* v. *Erving*, 228 U.S. 233, the court said at page 240:

> "In our opinion, *res ipsa loquitur* means that the facts of the occurrence warrant the inference of negligence, not that they compel such an inference; that they furnish circumstantial evidence of negligence where direct evidence of it may be lacking, but it is evidence to be weighed, not necessarily to be accepted as sufficient; that they call for explanation or rebuttal, not necessarily that they require it; that they make a case to be decided by the jury, not that they forestall the verdict. *Res ipsa loquitur, where it applies,* does not convert the defendant's general issue into an affirmative defense. When all the evidence is in, the question for the jury is, whether the preponderance is with the plaintiff." (Italics ours.)

In *San Juan Light & Transit Co.* v. *Requena*, 224 U.S. 89, 98-99, the court said:

> ". . . when a thing which causes injury, without fault of the injured person, is shown to be under the *exclusive control of the defendant*, and the injury is such as in the ordinary course of things does not occur if the one having such control uses proper care, it affords reasonable evidence, in the absence of explanation, that the injury arose from the defendant's want of care." (Italics ours.)

The rule deducible from all the cases is well stated in 1 Shearman & Redfield, Negligence (Rev. Ed.) p. 152, § 56:

> "Circumstantial evidence is insufficient . . . where the circumstances are consistent with freedom from wrong. The doctrine of res ipsa loquitur, which is 'a common-sense appraisal of the probative value of circumstantial evidence', requires evidence which shows at least the *probability* that a particular accident could not have occurred without legal wrong by the defendant. *The inference of negligence must be the only one* that can fairly and reasonably be drawn from the attendant circumstances." (Italics ours.)

2. Application of the doctrine has often been considered by courts of last resort.

There is no difficulty in applying the doctrine in the case of a passenger injured by reason of a derailment. This is so both because of the high degree of care owed to a passenger and because of the fact that the passenger has no control of the instrumentality causing his injury.

> *Kay* v. *Metropolitan St. Ry. Co.*, 163 N.Y. 447, 453 (cited with approval in *Sweeney* v. *Erving*, 228 U.S. 233, 240-241).

Gilchrist v. *Boston Elevated Ry.*, 272 Mass. 346.
See *Patton* v. *Texas & Pacific Ry. Co.*, 179 U.S. 658, and cases cited at page 663.
1 Shearman & Redfield, Negligence (Rev. Ed.) p. 152.

There is a difference, however, in the application of the doctrine in employee cases.

Patton v. *Texas & Pacific Ry. Co.*, 179 U.S. 658, 663.
Texas & Pacific Ry. Co. v. *Barrett*, 166 U.S. 617.
Minneapolis & St. Louis R.R. Co. v. *Gotschall*, 244 U.S. 66, 67.
Lynch v. *N.Y., N.H. & H. R.R.*, 294 Mass. 152, 162.
Curtin v. *Boston Elevated Ry.*, 194 Mass. 260, 264.

In *Patton* v. *Texas & Pacific Ry. Co.*, 179 U.S. 658, the court said at page 663:

> ". . . while in the case of a passenger the fact of an accident carries with it a presumption of negligence on the part of the carrier, a presumption which in the absence of some explanation or proof to the contrary is sufficient to sustain a verdict against him, for there is *prima facie* a breach of his contract to carry safely, . . . *a different rule obtains as to an employé.* The fact of accident carries with it no presumption of negligence on the part of the employer, and it is an affirmative fact for the injured employé to establish that the employer has been guilty of negligence." (Italics ours.)

The doctrine of *res ipsa loquitur* is a doctrine of limited application.

United States v. *Porter Bros. & Biffle*, 95 Fed. (2) 694, 698.

Plumb v. *Richmond, L. & R.R. Co.*, 233 N.Y. 285, 288.

1 Shearman & Redfield, § 56, p. 150.

In *United States* v. *Porter Bros. & Biffle*, 95 Fed. (2) 694, the court said at page 698:

> "The doctrine of res ipsa loquitur is *restricted in its application* to cases where the defendant had exclusive control of the thing which caused the injury, the party injured was without fault, and the injury was such as in the ordinary course of things would not have occurred if the one having such control had used proper care. In the absence of an explanation in such cases, the court may presume that the injury arose from the defendant's want of care, but the presumption does not reasonably follow unless all other conclusions are fairly excluded." (Italics ours.)

(a) In a suit by an employee against an employer, the doctrine is never applicable *unless the instrumentality or instrumentalities involved are, at the time of the accident, under the exclusive control, direction, management, or operation of the defendant.*

San Juan Light & Transit Co. v. *Requena*, 224 U.S. 89, 98-99.

United States v. *Porter Bros. & Biffle*, 95 Fed. (2) 694, 698.

Bonner v. *Texas Co.*, 89 Fed. (2) 291, 294.

Gray v. *Baltimore & Ohio R. Co.*, 24 Fed. (2) 671.

Asprodites v. *Standard Fruit & S.S. Co.*, 108 Fed. (2) 728, 729.

Courtney v. *N.Y., N.H. & H. R.R.*, 213 Fed. 388, 390.

Lynch v. *N.Y., N.H. & H. R.R.*, 294 Mass. 152, 162.

Pittsley v. *Allen*, 297 Mass. 83, 85.

Lonergan v. *American Ry. Ex. Co.*, 250 Mass. 30, 36.

Reardon v. *Boston Elevated Ry.*, 247 Mass. 124, and cases collected.

Massa v. *Nippon Yusen Kaisha*, 264 N.Y. 283, 284-285.

Henson v. *Lehigh Valley R.R. Co.*, 194 N.Y. 205.

Lennon v. *Rawitzer*, 57 Conn. 583, 587.

Texas & Pacific Coal Co. v. *Kowsikowsiki* 103 Tex. 173, 174-175.

Dryden v. *Western Pacific R. Co.*, 1 Cal. App. (2) 49.

Pekin Wood Products Co. v. *Burkhardt*, 192 Ark. 1025.

In *San Juan Light & Transit Co.* v. *Requena*, 224 U.S. 89, the court said at pages 98-99:

> ". . . when a thing which causes injury, without fault of the injured person, is shown to be under the *exclusive control of the defendant*, and the injury is such as in the ordinary course of things does not occur if the one having such control uses proper care, it affords reasonable evidence, in the absence of an explanation, that the injury arose from the defendant's want of care." (Italics ours.)

In *United States* v. *Porter Bros. & Biffle*, 95 Fed. (2) 694, the court said at page 698:

> "The doctrine of res ipsa loquitur is restricted in its application to cases where *the defendant had exclusive control* of the thing which caused the injury, the party injured was without fault, and the injury was such as in the ordinary course of things would not have occurred if the one having such *control* had used proper care. In the absence of an explanation in such cases, the court may presume that the injury arose from the defendant's want of care, but the presumption does not reasonably follow unless all other conclusions are fairly excluded." (Italics ours.)

In *Bonner* v. *Texas Co.*, 89 Fed. (2) 291, the court said at page 294:

> "Res ipsa loquitur does not help, for that doctrine applies only when the instrumentalities causing injury are shown to have been *wholly in the care of defendant*, and not to have been meddled with by the person injured or outsiders." (Italics ours.)

In *Gray* v. *Baltimore & Ohio R. Co.*, 24 Fed. (2) 671, the court said at page 673:

> "The switch was taken under the *control of the negro* at the time he sawed the lock, and from that time until the wreck *it cannot be said that it was solely under the control of the defendant.*" (Italics ours.)

In *Massa* v. *Nippon Yusen Kaisha*, 264 N.Y. 283, the court said at pages 284-285:

> "*The first item of proof necessary to bring this rule into action is that the thing is shown to be under the management of the defendant.*" (Italics ours.)

In *Lennon* v. *Rawitzer*, 57 Conn. 583, the court said at page 587:

> ". . . there are several conditions which are essential to lay the foundation for any presumption. One is that the thing must be *under the management of the defendant or his servants.* Here the actual management at the time was controlled by the plaintiff, which would at least require caution in applying the rule, lest the plaintiff's own carelessness be visited on the defendants." (Italics ours.)

In the case at bar the evidence shows that this was a hand switch (R. pp. 16-17, 39, 75), operated by the intestate (R. pp. 12, 23), and there is no evidence that anyone touched the switch after the intestate had thrown it for the switching movement of the train onto the side track. The plaintiff's only witness to the accident, Whitney, the locomotive engineer, testified (R. p. 17) that after the accident he examined the switch and observed that the switch was set for the north siding, and with reference to the switch stand he observed that the handle was down and the lock was in place but not locked; that that was the customary thing because the brakeman (Jesionowski) was going to let him out and then throw the switch again later (R. pp. 17-18). Accordingly the judge instructed the jury (R. p. 104): "Now there is no question that the deceased had control of the switch for the purpose of directing the movement of the cars . . ."

Since there was no objection or exception, this became the law of the case.

S. E. Rand Transportation Co. v. *Boston & Maine R.R.*, 273 Mass. 327, 329, 332.
Dunbar v. *Ferrera Bros. Inc.*, 306 Mass. 90, 91.

Prondecka v. *Turners Falls Power & Elec. Co.*, 238 Mass. 239, 241.

Arabia v. *John Hancock Mut. Life Ins. Co.*, 301 Mass. 397, 401.

Santa Maria v. *Trotto*, 297 Mass. 442, 446-447.

On the facts just stated, the doctrine of *res ipsa loquitur* is not applicable to this case, and the Circuit Court of Appeals was correct in the following statement (R. p. 123):

> "Thus an essential element of the principle of *res ipsa loquitur* is that the defendant have exclusive control of the thing causing the injury. Such essential element is not clear in this case."

(*b*) Nor can an employee rely upon the application of the doctrine in cases in which the accident *may have happened without fault on the part of the employer.*

New York Central R. Co. v. *Ambrose*, 280 U.S. 486, 490.

Patton v. *Texas & Pacific Ry. Co.*, 179 U.S. 658, 663-664.

Courtney v. *N.Y., N.H. & H. R.R.*, 213 Fed. 388, 390 (cited with approval in *Lynch* v. *N.Y., N.H. & H. R.R.*, 294 Mass. 152, 163).

Massa v. *Nippon Yusen Kaisha*, 264 N.Y. 283, 284-285.

Francey v. *Rutland R.R. Co.*, 222 N.Y. 482, 485-486.

Texas & Pacific Coal Co. v. *Kowsikowsiki*, 103 Tex. 173, 174-175.

Klingman v. *Loew's Inc.*, 296 N.W. 528, 531.

Kid v. *Coahuila Lead & Zinc Co.*, 204 S.W. 284, 286, 287, and cases cited.

In *New York Central R. Co.* v. *Ambrose*, 280 U.S. 486, the court said at page 490:

> "The utmost that can be said is, that *the accident may have resulted from any one of several causes*, for some of which the company was responsible, and for some of which it was not. This is not enough. See *Patton* v. *Texas & Pacific R. Co.*, 179 U. S. 658, where, at page 663, this court said: 'The fact of accident carries with it no presumption of negligence on the part of the employer, and it is an affirmative fact for the injured employé to establish that the employer has been guilty of negligence. . . . *it is not sufficient for the employé to show that the employer may have been guilty of negligence—the evidence must point to the fact that he was.* And where the testimony leaves the matter uncertain and shows that any one of half a dozen things may have brought about the injury, for some of which the employer is responsible and for some of which he is not, it is not for the jury to guess between these half a dozen causes and find that the negligence of the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion. If the employé is unable to adduce sufficient evidence to show negligence on the part of the employer, it is only one of the many cases in which the plaintiff fails in his testimony, and no mere sympathy for the unfortunate victim of an accident justifies any departure from settled rules of proof resting upon all plaintiffs.'" (Italics ours.)

In *Courtney* v. *N.Y., N.H. & H. R.R.*, 213 Fed. 388, the court said at page 390:

> "The maxim res ipsa loquitur does not apply where the accident *might have been due to improper handling*

as well as to improper furnishing the thing causing the accident." (Italics ours.)

In *Massa* v. *Nippon Yusen Kaisha*, 264 N.Y. 283, the court said at page 285:

"There is no presumption that the defendant was lacking in proper care in furnishing proper appliances when *the accident might have happened* through the carelessness of some member of the *stevedore's gang.*" (Italics ours.)

In *Francey* v. *Rutland R.R. Co.*, 222 N.Y. 482, the court said at pages 485-486:

"The mere happening of the accident did not necessarily exclude the inference that it might have been caused by the negligence of the plaintiff, or without any negligence at all. It was, therefore, necessary for the plaintiff to supplement the proof of the accident with evidence tending to show that it resulted from the failure of the defendant to exercise ordinary care, either in the selection of the engine or in keeping it in reasonably safe repair.

"In the present case the proof at the conclusion of the evidence was such that *the jury might have found the accident was due to either one of two causes*—negligence on the part of defendant in failing to keep the locomotive in repair, or to the negligence of the plaintiff in letting cold water into the boiler in the condition in which it was at the time the explosion took place. Before the plaintiff could recover, therefore, the burden was upon him to prove that the accident was due *solely* to the first cause. If it were just as probable that the explosion was due to one cause as the other, then he necessarily must fail in the action." (Italics ours.)

In *Texas & Pacific Coal Co.* v. *Kowsikowsiki*, 103 Tex. 173 (*a case directly in point*), the court said at pages 174-175:

> "'Where the particular thing causing the injury has been shown to be under the management of the defendant, or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation, that the accident arose for want of care.'
>
> "This would probably be an eminently just conclusion if the assumption upon which it is founded were just, viz., that the evidence shows that the particular thing which caused the death in question was under the exclusive management and control of the defendant. The derailment of the car, unexplained, is a fact which by its very nature may be admitted to suggest something amiss, a want of proper precaution somewhere. But what was the cause of the derailment? Until we can answer that question, we think it must be admitted that it is not shown by the evidence that the particular thing which caused this injury was in the exclusive management of the defendant. If everything that could reasonably be assigned as the cause of the derailment had been wholly under the control of servants of defendant other than the deceased himself, it might be inferred that the cause, whatever it was, consisted in some negligent act or omission of theirs. *But we have a track, with its switches, and a motor car, defects in, or negligent management of, any of which might have brought about that which happened. The deceased himself had a hand in the management of the switches, and also in controlling the movements of the car, in so far as it depended on the giving of signals.* Negligence is

not to be imputed either to him or to the defendant's other servants without proof; and a state of facts in which the cause of the accident cannot be found does not warrant a conclusion that one, rather than the other, produced it. We cannot presume in favor of one against the other. Evidence must be brought by a plaintiff, having the burden of proof, sufficient to justify an inference of negligence on the part of the defendant, and none such can be drawn from an occurrence which, while indicating negligence somewhere, is as consistent with the hypothesis that it was his own, or that of one in whose right he sues, as it was that of the other party." (Italics ours.)

In *Klingman* v. *Loew's Inc.*, 296 N.W. 528 (Minn.), the court said at page 531:

"The circumstances must exclude any reasonable probability that the fault of the one seeking to invoke it (the doctrine of *res ipsa loquitur*) contributed to the result of which he complains."

In *Kid* v. *Coahuila Lead & Zinc Co.*, 204 S.W. 284 (Mo.), the court said:

"Where the evidence is circumstantial only and reveals a state of facts from which the inference could as reasonably be drawn that the accident was due to a cause or causes other than one tainted with the defendant's negligence, then the plaintiff cannot recover. *Wilkerson* v. *Railroad Co.*, 140 Mo. App. 306, 320.

"In *Byerly* v. *Light & Power Co.*, 130 Mo. App. 593, the court said: 'Where the evidence shows the injury may have been caused by the negligent act, but in its aspect most favorable to the plaintiff is just as consistent with the inference that *the injury might have*

been produced by another cause, to send the case to the jury would be to accord them the right to make an arbitrary choice between two equally probable, but unproved conclusions, and thus the verdict, if for the plaintiff, would be based not entirely on evidence, but in part on mere speculation and conjecture. This would mean a reversal of the rule imposing the burden of proof on the plaintiff, since the defendant, in order to prevent the jury from making him the victim of conjecture would be forced to assume the burden of showing that his negligence did not produce the injury.'

"*Where there are two or more possible causes for an accident,* each shown by circumstantial evidence only, and the one might just as reasonably and certainly be inferred from the evidence as the other, then the jury cannot be allowed to attribute it to the one tainted with negligence rather than the other, for to do so is mere speculation. This is merely an application of the oft-repeated rule stated in *Warner v. Railroad,* 178 Mo. 125, 133, that: 'If the injury *may have resulted from one of two causes,* for one of which, and not the other, the defendant is liable, the plaintiff must show with reasonable certainty that the cause for which the defendant is liable produced the result, and if the evidence leaves it to conjecture, the plaintiff must fail in his action.' "

And at page 287:

"The rule which we applied is also stated in *Rogers* v. *Packing Co.,* 180 Mo. App. 227, 236, as follows: 'In a case where the injury *might have resulted from one of several causes,* for one of which the defendant is liable and for the others he is not liable, it is incumbent upon the plaintiff to prove his case by showing that the in-

jury arose from that cause for which the defendant is liable.' "

(*c*) In the case at bar the plaintiff's uncontradicted evidence shows, not only that the accident *may have happened through no negligence of the defendant, but that it probably resulted from the intestate's own conduct.* The plaintiff's witness Whitney, the locomotive engineer (R. p. 10), the only eye-witness to the accident, testified (R. pp. 11, 22) that Jesionowski, the brakeman, had been riding with him in the cab of the engine, and he went back to cut off four cars so he then had four freight cars and a locomotive which were to go forward toward the Saugus River (R. p. 22); that after Jesionowski had cut the four cars off he (the witness) received a lantern signal to go ahead (R. pp. 11, 22), and he continued to go ahead towards the Saugus River until he got from Jesionowski a signal to stop; that when he stopped in response to that lantern signal the front of his locomotive was at a switch point or cross-over near the Saugus River at the point marked "A" on the plan (Exhibit 1, R. p. 111) (R. p. 22). The witness Whitney further testified (R. p. 22) that the length of the locomotive was about 80 feet and those freight cars were about 40 feet, with a space between the cars for coupling purposes about 18 inches (R. p. 22); that the total length of the train was about 246 feet (R. p. 31); that when he finally came to a stop, after the derailment, the front of the locomotive was near the switch stand, which is marked "B" on the plan (Exhibit 1, R. p. 111) (R. p. 24); that he got off the locomotive and went back and found one end of the car was on the main line and the other end was on the north siding, so there was a derailment of that fourth car from the engine (R. pp. 15, 25-26); that he examined the switch (R. p. 16) and observed that the switch was set for the north siding (R.

p. 17), and with reference to the switch stand he observed that the handle was down and the lock was in place but not locked; that that was the customary thing, *because the brakeman* (Jesionowski) *was going to let him out and then throw the switch again later* (R. pp. 17-18); that in making the movements forward, in stopping, and in backing he relied on the signals he got from Jesionowski (R. p. 23). There was evidence that the distance between the cross-over marked "A" on the plan (Exhibit 1, R. p. 111) and the switch stand marked "B" on the plan was 224 feet (R. p. 35). Mathematical calculation shows that with the front of the locomotive stopped at point "A" in response to Jesionowski's signals, with the over-all length of the engine and four cars about 246 feet (R. p. 31), the rear of the last car would be 22 feet beyond the switch toward Lynn, that is, short of the switch. The switch point was 15 feet long (R. pp. 37, 38); on the freight car which was derailed the distance between the two sets of trucks was 25 feet 9 inches (R. p. 42); and the length of this freight car was 44 feet 9 inches (R. p. 43). There was sufficient space underneath this last car for the switch point to operate easily, and the probability is that while the car was in this position, with the wheels still on the main track straddling the switch point, Jesionowski threw the hand switch and then gave the motion to back. The result of this operation would be that the lead trucks would back along the main track—and it is significant that these lead trucks were not derailed (R. p. 15, Q. 94; p. 26, X-Q. 223; p. 50, Q. 12; p. 63, Q. 17-18; p. 73, Q. 24)—while the other trucks and the cars following would back along the north siding. In this way the lead car would become derailed; and this is precisely what the evidence shows happened, since the marks of derailment commenced 69 feet beyond the switch toward Lynn and continued for 170 feet beyond (R. pp. 76-77).

Thus the plaintiff's evidence shows, not only that the derailment *may have happened without negligence on the part of the defendant, but that it probably resulted from the conduct of the intestate, who operated the switch and controlled the situation.* The intestate signaled the engineer where to stop before he threw the hand switch, and after throwing the switch he gave the engineer the motion to back (R. pp. 12-13, 22-23).

This explanation, based upon the physical facts and simple mathematical calculations, affords a reasonable explanation of the derailment and repels any inference of negligence on the part of the defendant, since under the doctrine of *res ipsa loquitur* "*the inference of negligence must be the only one that can fairly and reasonably be drawn from the attendant circumstances.*"

1 Shearman & Redfield, Negligence (Rev. Ed.) p. 152.

United States v. *Porter Bros. & Biffle*, 95 Fed. (2) 694, 698.

3. Since the inference of negligence of the defendant is not the only inference that can fairly and reasonably be drawn from the circumstances surrounding the derailment, the plaintiff has failed to sustain her burden of proof.

Payne v. *Boucher*, 270 Fed. 38, 40.

Patton v. *Texas & Pacific Ry. Co.*, 179 U.S. 658, 663-664.

In *Payne* v. *Boucher*, 270 Fed. 38, the court said at page 40:

> "Negligence of the employer is an affirmative fact to be established by the one speaking for the deceased

employee. . . . Evidence that the employer *may have been guilty of negligence* is not sufficient."

In *Patton* v. *Texas & Pacific Ry. Co.*, 179 U.S. 658, the court said at pages 663-664:

> "The fact of accident carries with it no presumption of negligence on the part of the employer, and it is an affirmative fact for the injured employé to establish that the employer has been guilty of negligence. *Texas & Pacific Railway* v. *Barrett*, 166 U. S. 617. Second. That in the latter case it is not sufficient for the employé to show that the employer may have been guilty of negligence—the evidence must point to the fact that he was. And where the testimony leaves the matter uncertain and shows that any one of half a dozen things may have brought about the injury, for some of which the employer is responsible and for some of which he is not, it is not for the jury to guess between these half a dozen causes and find that the negligence of the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion. If the employé is unable to adduce sufficient evidence to show negligence on the part of the employer, it is only one of the many cases in which the plaintiff fails in his testimony, and no mere sympathy for the unfortunate victim of an accident justifies any departure from settled rules of proof resting upon all plaintiffs."

In this connection the Circuit Court of Appeals in its opinion said (R. p. 122):

> "The 'thing' which caused the injury in our case was within the confines of a compound of several elements, including the stopping of the train to begin the

switching, the giving of the signals, the throwing of the switch, the backing of the train, the condition of the track and track bed, the switch mechanism, the car wheel flanges and other rolling stock equipment. In this compound of elements the railroad corporation was not in exclusive control. Jesionowski was in control of important elements. In a very practical sense he, and not the corporation, was in control of very important elements, for he alone was in a position to observe; and it was his duty to observe and require the train to pull forward far enough for all of the wheels of the fourth car to clear the switch points before signaling the engineer to stop the forward movement, and the same duty continued after throwing the switch and before giving the signal to back.

"The thing that caused the injury could have been Jesionowski's fault, or it could have been the railroad corporation's fault. It was the jury's duty to determine the cause of the accident, and since it must make that determination out of a set of facts wherein either one or both of the actors may have been at fault, it must do so without the aid of the doctrine of *res ipsa loquitur.*"

This statement of the Circuit Court of Appeals is based upon the decisions of this court and other courts of last resort. A case directly in point on the facts is *Texas & Pacific Coal Co.* v. *Kowsikowsiki*, 103 Tex. 173, 174-175, which is cited with quotations on page 20 of this brief.

Accordingly it has been held by courts of last resort in many jurisdictions that the mere derailment of a car is not evidence of negligence which would warrant recovery by an injured employee.

Texas & Pacific Coal Co. v. *Kowsikowsiki*, 103 Tex. 173, 174-175.

Henson v. *Lehigh Valley R.R. Co.*, 194 N.Y. 205.
Keogh v. *South Buffalo Ry. Co.*, 233 N.Y. 31.
Lockwood, Admr., v. *Chicago &c. Ry. Co.*, 55 Wis. 50, 53.
Robertson v. *Chicago &c. Ry. Co.*, 225 N.W. 160 (Minn.).
Lynch v. *N.Y., N.H. & H. R.R.*, 294 Mass. 152, 162.

The case of *Terminal R. Assn. of St. Louis* v. *Staengel*, 122 F. (2) 271, is clearly distinguishable. In that case the derailment was caused by an automatic switch, controlled from a switch tower by a servant of the defendant, and not, as in the case at bar, a hand switch operated by the intestate himself. Moreover, in the *Staengel* case all the cars of the freight train had safely passed the switch except the rear wheels of the last car, when concededly the switch jumped. From these facts it could be inferred either that the switchman in the tower threw the lever too soon or that there was some defect in the automatic switch which caused the derailment. From either of these causes negligence of the defendant could be inferred.

In this connection the court said at page 275:

> "In short, this evidence showed an abnormal action of the switch, which action defendant's evidence showed could not have happened with normal functioning and which defendant could not account for nor offer any explanation.
>
> "Even if we take all this evidence as true, it is clear that there must have been some defect in these switch instrumentalities because it did shift to the 11th Street track within a very few seconds after the front trucks of the last car passed over it."

The plaintiff's burden of proof has not been sustained when the record leaves the matter in the realm of speculation and conjecture.

New York Central R. Co. v. *Ambrose*, 280 U.S. 486, 489-490.

Pennsylvania R. Co. v. *Chamberlain*, 288 U.S. 333.

Patton v. *Texas & Pacific Ry. Co.*, 179 U.S. 658, 663.

Mucha v. *Northeastern Crushed Stone Co., Inc.*, 307 Mass. 592, 597.

Curtin v. *Boston Elevated Ry.*, 194 Mass. 260, 264.

Robertson v. *Chicago &c. Ry. Co.*, 225 N.W. 160, 161-162 (Minn.).

Showalter v. *Western Pacific R. Co.*, 16 Cal. (2) 460.

In *New York Central R. Co.* v. *Ambrose*, 280 U.S. 486, the court said at pages 489-490:

> "In any view of the matter, the respondent (plaintiff) upon whom lay the burden, completely failed to prove that the accident was proximately due to the negligence of the company. It follows that the verdict rests only upon speculation and conjecture, and can not be allowed to stand. . . .
>
> "*The utmost that can be said is, that the accident may have resulted from any one of several causes, for some of which the company was responsible, and for some of which it was not. This is not enough.* See *Patton* v. *Texas & Pacific R. Co.*, 179 U.S. 658, . . . 663." (Italics ours.)

In *Mucha* v. *Northeastern Crushed Stone Co., Inc.*, 307 Mass. 592, the court said at page 597:

> "Several conjectures may be indulged in as to the cause of the breaking of the timber, none of which could be attributed to any defect or unsuitableness. It is true that what inferences are to be drawn depend not only upon the fact that the timber broke, but also on the special facts of the case, the circumstances of the occurrence that has caused the injury, and 'the teachings of experience with regard to them.' . . . But this is not a case where the evidence affords a reasonable inference of negligence on the part of the defendant as alleged."

In *Robertson* v. *Chicago &c. Ry. Co.*, 225 N.W. 160 (Minn.), the court said at pages 161-162:

> "Verdicts cannot rest on conjecture. The burden was on plaintiff to show that the accident resulted from defects in the car. It is not enough to show that there may have been defects. The evidence must go further and justify an inference that the accident resulted from the cause alleged rather than from some other cause. *If it is equally probable that the accident resulted from some cause other than the negligence of the defendant, there can be no recovery.* To warrant a recovery the evidence must furnish a reasonable basis for a finding that the accident is more likely to have resulted from the negligence alleged than from other causes." (Italics ours.)

All the cases hold that, where there are a number of conjectures equally consistent with the facts, the jury will not be permitted to select that conjecture which harmonizes with their sympathy.

Moreover, in the case at bar it must be remembered that by its verdict for the defendant on the first count the jury found there was no defect in the car, track, or roadbed, which includes the switch and the frog.

Since, therefore, there was no evidence of negligence on the part of the defendant, and since the doctrine of *res ipsa loquitur* is not applicable to the facts, the jury should not have been allowed to speculate as to the cause of the derailment.

III. The petitioner's arguments do not support her contention that the Circuit Court of Appeals was in error as specified (Petition, pp. 5-6).

1. In discussing the first specification of error (Petitioner's Brief, p. 12) the petitioner contends that the doctrine of *res ipsa loquitur* as stated to the jury by the trial court became the law of the case "because the defendant did not take exception to the statement of rule of *res ipsa* as it was stated to the jury." This contention is without merit. While it is true that the defendant took no exception to the charge of the court, it did take an exception to the court's refusal to give its sixth request (R. p. 113):

> "6. The doctrine of *res ipsa loquitur* is not applicable to the facts of this case."

No exception to the charge was necessary, since the defendant's rights were properly saved by its exception to the court's refusal to grant its request.

Conn. Mutual Life Ins. Co. v. *Hillmon*, 188 U.S. 208, 212-213.

Peirson v. *Boston Elevated Ry.*, 191 Mass. 223, 234.

Ginzler v. *Birmingham*, 6 Ala. App. 666.

In *Conn. Mutual Life Ins. Co.* v. *Hillmon*, 188 U.S. 208, the court said at page 213:

> "It is insisted in behalf of the plaintiff that, as no exception was taken to this part of the charge, its propriety cannot be questioned at this time; but as an exception was properly taken to the refusal of the court to charge . . . , we think there was sufficient to raise the point. . . . Having excepted to the refusal to give a certain instruction, it was not necessary to repeat such exception when the contrary of such request was given in the general charge. As defendant had raised the point in one form, it was not necessary to raise it in another."

In *Peirson* v. *Boston Elevated Ry.*, 191 Mass. 223, the court said at page 234:

> "Nor is it any answer to the respondent's complaint to say that no exception was taken to the manner in which the charge to the jury dealt with this question. The evidence had been admitted subject to the respondent's exception. It had preserved its rights, and was not called upon to ask for any further ruling or to save any further exception upon this subject."

Since the trial judge's charge on the question of *res ipsa loquitur* did not become the law of the case, for the reasons already stated, it was the right and the duty of the Circuit Court of Appeals to apply the law correctly. This the Circuit Court of Appeals did, stating in its opinion (R. p. 122):

> "The thing that caused the injury could have been Jesionowski's fault, or it could have been the railroad corporation's fault. It was the jury's duty to determine the cause of the accident, and since it must make

that determination out of a set of facts wherein either one or both of the actors may have been at fault, it must do so without the aid of the doctrine of *res ipsa loquitur.*"

The District Court was in error in allowing the jury to determine the applicability of the doctrine of *res ipsa loquitur,* for two reasons: First, because the undisputed evidence introduced by the plaintiff shows that the defendant did not have exclusive control of all the instrumentalities and factors involved in the derailment, and secondly, because the evidence leaves it wholly conjectural as to whether the derailment resulted from the conduct of the intestate or from some cause for which the defendant was responsible. The cause of the derailment being thus speculative, as stated, the plaintiff has failed to sustain her burden of proof.

In this connection the petitioner says in her brief (pp. 16-17): "Now it is clear that the burden is on a plaintiff to exonerate himself from all blame. He must be utterly guiltless. It is one of the imperative *conditions precedent* to his right to use the rule of *res ipsa.* Plainly this is a question of fact for the jury." But, as was said by the Circuit Court of Appeals in its opinion (R. p. 122): "It was the jury's duty to determine the cause of the accident . . . without the aid of the doctrine of *res ipsa loquitur.*"

In her brief (p. 16 top) the petitioner quotes the following language from the opinion of the Circuit Court of Appeals:

> "*The possible causal actions leading up to the fatal accident cannot be so separated*"

and then says: "The appellate court does not cite a single authority in support of this ruling." While it is true that

the Circuit Court of Appeals cites no case that has discussed the precise language of its Opinion, it has cited authorities which sustain its ruling. Among other authorities cited by the Circuit Court of Appeals is the case of *Texas & Pacific Coal Co.* v. *Kowsikowsiki*, 103 Tex. 173, in which the court says at pages 174-175:

> "*But we have a track, with its switches, and a motor car, defects in, or negligent management of, any of which might have brought about that which happened. The deceased himself had a hand in the management of the switches, and also in controlling the movements of the car, in so far as it depended on the giving of signals.* . . . Evidence must be brought by a plaintiff, having the burden of proof, sufficient to justify an inference of negligence on the part of the defendant, and none such can be drawn from an occurrence which, while indicating negligence somewhere, is as consistent with the hypothesis that it was his own, or that of one in whose right he sues, as it was that of the other party." (Italics ours.)

On page 17 of her brief the petitioner cites six cases in support of the following statement: "The following cases directly or by necessary implication hold that the plaintiff's freedom from fault is a jury question:"

In *Van Horn* v. *Pacific Refining & Roofing Co.*, 27 Cal. App. 105, 109, the plaintiff was injured by reason of the explosion of a steampipe cap *which was in the exclusive control of the defendant.*

In *Wright* v. *South Counties Gas Co.*, 102 Cal. App. 656, 664, a prospective tenant inspecting an apartment house was injured by a gas explosion. No question of the plaintiff's conduct was involved.

In *Cantley* v. *M., K., T. Railroad Co.*, 353 Mo. 605, there was an issue of fact as to whether or not the speed of the engine at a curve caused the derailment, the plaintiff having nothing to do with the operation of the engine.

In *Graham* v. *Badger*, 164 Mass. 42, 48, an employee was injured by the fall of a staging due to the breaking of a defective rope. Since the employer had exclusive control of all the instrumentalities and the employee had nothing to do with the rope or construction of the staging, it was held to be a proper case for the application of the doctrine of *res ipsa loquitur*.

In *Rayburn* v. *Penn. R. Co.*, 76 Fed. (2) 505, 506, the plaintiff, an employee of an independent contractor in railroad yards, was hit by a shovel falling from the roof of a freight train. Since defendant had exclusive control, and there was no question of plaintiff's conduct, the doctrine of *res ipsa loquitur* was applied by the court.

In *Doughnut Machine Corp.* v. *Bibbey*, 65 Fed. (2) 635, the lessee of a doughnut machine was injured by reason of a defective condition of the machine. And the petitioner is in error in stating in her brief (pp. 17-18) that "Apparently the present court intended to overrule its own precedent, wherein the question of plaintiff's negligence was left to the jury, while still permitting application of the doctrine of res ipsa." In the *Bibbey* case the court did not permit the application of the doctrine of *res ipsa loquitur* for the reason that there was direct evidence of a defective condition of the machine which caused the injury.

None of the foregoing cases cited by the petitioner is authority for the proposition that the doctrine of *res ipsa*

loquitur is applicable to the facts of a case like the case at bar.

On page 18 of her brief the petitioner quotes a passage from Prosser on Torts (1941 Ed.), erroneously giving the page number. The page is not 330, but 300. This quotation from Prosser does not help the plaintiff, since the plaintiff has failed "to eliminate the *possibility* that it was the plaintiff who was responsible," and has failed to account for the intestate's conduct.

In the case at bar it was the intestate who signaled the engineer where to stop; it was the intestate who threw the hand switch; and it was the intestate who signaled the engineer when to back (R. pp. 12-13, 22-23). The plaintiff has failed to show that the derailment was not due to his control of the switching operation.

Texas & Pacific Coal Co. v. *Kowsikowsiki*, 103 Tex. 173, 174-175.

In her brief, pages 18-19, the petitioner argues in substance that the burden was on the defendant to prove that Jesionowski was negligent. The gist of the argument is stated on page 19 as follows: "The claim that Jesionowski signaled the train to back up before the fourth car in the forward movement had cleared the switch at 'B' was purely an affirmative defense. The burden was on the defendant to prove this alleged fact by a fair preponderance of the evidence." This is erroneous.

The Massachusetts statute and the Federal case cited do not support the petitioner's contention. Those are authorities merely for the proposition that the defendant has the burden of proving contributory negligence. But contributory negligence is not an issue in this case for the purpose of this petition. It is true that the defendant's answer (R.

pp. 5-6) contains the following: "And further answering the second count of the complaint, the defendant says that the plaintiff's intestate was guilty of negligence which was the sole proximate cause of his injuries and death." But this is a wholly unnecessary and immaterial allegation. It is only another way of saying that there was no negligence on the part of the defendant, which is properly raised by the general issue. The defendant's general issue cannot thus be converted into an affirmative defense.

Sweeney v. *Erving*, 228 U.S. 233, 240.

The burden of proof is always on the employee to show negligence of the employer.

Pennsylvania R. Co. v. *Chamberlain*, 288 U.S. 333, 343.

Baltimore & Ohio R. Co. v. *Berry*, 286 U.S. 272, 276.

St. Louis &c. Ry. v. *Mills*, 271 U.S. 344, 347.

Although the evidence may not have been sufficient to sustain the burden, if the defendant had the burden, of proving that the fourth freight car straddled the switch, it did establish, by way of explanation, the *possibility* of the derailment being the result of the conduct of Jesionowski. And this fact alone is sufficient to defeat the application of the doctrine of *res ipsa loquitur*. See the cases previously cited in our brief, pages 17-23.

2. In arguing the second specification of error (Petitioner's Brief, p. 20) the petitioner contends that the Circuit Court of Appeals was in error because it assumed that "the derailment could not have occurred at any point except the switch." No such assumption appears in the opinion of the Circuit Court of Appeals. The language of

the opinion (R. p. 122) is: "The 'thing' which caused the injury in our case was within the confines of a compound of several elements, *including . . . the switch mechanism . . .*" This is far from saying that the derailment occurred at the switch, although it does take into consideration the *possibility* that the operation of the switch by Jesionowski may have caused the derailment, marks of which commenced at a point 69 feet beyond the switch, going toward Lynn, and continued for 170 feet beyond that (R. pp. 76-77).

The petitioner, in her brief, pages 20-21, further criticizes the Circuit Court of Appeals for its use of the word "thing" in the following sentence: "The 'thing' which caused the injury in our case was within the confines of a compound of several elements, *including* the stopping of the train to begin the switching, the giving of the signals, the throwing of the switch, the backing of the train, the condition of the track and track bed, the switch mechanism, the car wheel flanges and other rolling stock equipment."

It is not the reasoning of the Circuit Court of Appeals which is at fault, but the logic of the petitioner. The petitioner argues that the word "*res*" in the phrase *res ipsa loquitur* means "thing," not "conduct," and then argues that "cases involving the doctrine and its application have dealt with 'things,' inanimate objects, machines, mechanisms; including the inanimate adjuncts of railroads—engines, cars, boilers, tracks, roadbeds, rails, switch points, frogs." The word "thing" as used in the doctrine of *res ipsa loquitur* does not mean inanimate objects as the petitioner claims, but rather means "the occurrence" or "happening" of an accident. And the occurrence or happening of an accident may result from conduct, as well as from defective conditions of inanimate things.

The petitioner cites (Brief, p. 21) the case of *Francey* v. *Rutland R.R. Co.*, 224 N.Y. 482, and sets out a quotation at page 484 of that case. The petitioner, however, does not set out the important quotation in that case, which appears at pages 485-486 as follows:

> "The mere happening of the accident did not necessarily exclude the inference that it might have been caused by the negligence of the plaintiff, or without any negligence at all. It was, therefore, necessary for the plaintiff to supplement the proof of the accident with evidence tending to show that it resulted from the failure of the defendant to exercise ordinary care, either in the selection of the engine or in keeping it in reasonably safe repair.
>
> "In the present case the proof at the conclusion of the evidence was such that the jury might have found the accident was due to either one of two causes—negligence on the part of the defendant in failing to keep the locomotive in repair, or to the negligence of the plaintiff in letting cold water into the boiler in the condition in which it was at the time the explosion took place. Before the plaintiff could recover, therefore, the burden was upon him to prove that the accident was due solely to the first cause. If it were just as probable that the explosion was due to one cause as the other, then he necessarily must fail in the action."

If the doctrine of *res ipsa loquitur* were applicable to the facts of this case it would mean that the *derailment* speaks for itself, not that the switch and other inanimate objects speak for themselves. It follows that the petitioner, having assigned an improper meaning to the ambiguous term "thing," has reached an unsound conclusion.

Moreover, the petitioner entirely ignores the fact that the question of a defective condition of the instrumentalities, including the switch, cars, track and roadbed, and frog, is no longer open to her in view of the jury's verdict for the defendant (R. pp. 9, 98) on the first count of the complaint (R. pp. 2-3), which alleges in substance that the death of the intestate was caused "by reason of a defect or insufficiency due to the negligence of the defendant, in its car, track, or roadbed."

In this connection the Supreme Judicial Court of Massachusetts said, in *Pupageorge* v. *Boston & Maine R.R.*, 317 Mass. 235, at page 239:

> "The verdict for the defendant upon the first count of the declaration which alleged a failure upon the part of the defendant to give the statutory signals required by G. L. (Ter. Ed.) c. 160, § 138, *is not consistent with any contention that can now be made that such signals were not given.*"

See also *Peterson* v. *Boston & Maine R.R.*, 310 Mass. 45, 51.

3. In discussing the third specification of error in her brief, pages 22-25, the petitioner says, in criticism of the portion of the opinion of the Circuit Court of Appeals set out in this specification, that "This statement again disregards the verdict, the finding that Jesionowski was without fault. It substitutes a judicial dictum that Jesionowski could have been at fault. It denies the existence of a fact legally established by the proper fact-finding body."

It is true that the jury is the fact-finding body, but a jury's verdict cannot stand which is based upon conjecture and not supported by evidence.

New York Central R. Co. v. *Ambrose*, 280 U.S. 486, 489-490.

Patton v. *Texas & Pacific Ry. Co.*, 179 U.S. 658, 663.

Pennsylvania R. Co. v. *Chamberlain*, 288 U.S. 333.

Chicago, M. & St. P. Ry. v. *Coogan*, 271 U.S. 472, 478.

Payne v. *Bucher*, 270 Fed. 38, 40.

Mucha v. *Northeastern Crushed Stone Co., Inc.*, 307 Mass. 592, 596-597.

Warner v. *Railroad*, 178 Mo. 125, 133.

Robertson v. *Chicago &c. Ry. Co.*, 225 N.W. 160, 161-162 (Minn.).

The petitioner's argument that Jesionowski was free from fault because of the jury's verdict begs the question. The record is bare of any evidence which would warrant the jury in finding that the accident may not have resulted from Jesionowski's control of the switching operation. It is true, as stated by the petitioner at page 23 of her brief, "that the switch was properly thrown," but it does not appear that it was thrown at the right time. The petitioner has failed, therefore, to eliminate the conduct of Jesionowski as a possible cause of the derailment, even if it were open to the petitioner, in view of the jury's verdict on the first count (*Papageorge* v. *Boston & Maine R.R.*, 317 Mass. 235, 239), to argue that there could be a finding, "under the doctrine of *res ipsa loquitur*, that there was something wrong with the connecting rod, or the switch points, or other switch mechanisms, which caused the derailment."

The petitioner has not made out a case for the application of the doctrine of *res ipsa loquitur* for two reasons: First, because the conduct of Jesionowski has not been

eliminated as a possible cause of the derailment; and second, because the petitioner has entirely failed to show that the defendant had exclusive control of all the instrumentalities, elements, and factors that may have caused the derailment.

It follows upon well-settled principles of law that the reasoning of the Circuit Court of Appeals is sound, and that the errors assigned by the petitioner are without merit.

In that part of her brief entitled "Conclusion" (Brief, p. 25) the petitioner says: " 'The law relating to res ipsa loquitur is replete with conflict, confusion and doubt. There is division of opinion as to circumstances required for its application and still greater disagreement as to the effect given it.' Professor Charles E. Carpenter, in University of Chicago Law Review, vol. 1, 1933, 1934, p. 519."

Whatever conflict, confusion, or doubt there may be as to the doctrine of *res ipsa loquitur* in other aspects, there is no conflict, confusion, or doubt as to the two essential elements involved in the case at bar. Neither textbook writers nor courts of last resort have ever applied the doctrine to facts like those in our case. In the first place, they deny the application of the doctrine unless it appears that the instrumentality or instrumentalities, elements, and factors which may have caused the injury are in the *exclusive control* of the employer; and in the second place, they deny the application of the doctrine in all cases where the accident *may have resulted* from some cause, including the conduct of the employee, for which the employer is not responsible. In both these aspects the burden is on the plaintiff to establish his right to the application of the doctrine of *res ipsa loquitur*.

Conclusion.

Wherefore the respondent prays that the petition for a writ of certiorari be denied.

Respectfully submitted,

FRANCIS P. GARLAND,

Attorney for the Respondent.

Of Counsel:

HURLBURT, JONES, HALL & BICKFORD.

FILE COPY

Office - Supreme Court, U. S.
FILED
NOV 7 1946
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States.

OCTOBER TERM, 1946

No. 88.

HELENE A. JESIONOWSKI, ADMINISTRATRIX,
Petitioner,

v.

BOSTON AND MAINE RAILROAD,
Respondent.

BRIEF FOR THE RESPONDENT.

FRANCIS P. GARLAND,
Attorney for Respondent.

Of Counsel:
HURLBURT, JONES, HALL & BICKFORD.

ADDISON C. MITCHELL & SON, LAW PRINTERS, BOSTON.

Subject Index.

	Page
Opinion below	1
Jurisdiction	1
Statement of the case	2
Statement of facts	4
Question presented	9
Summary of the argument	9
Argument	11
The Circuit Court of Appeals was not in error in ruling that the doctrine of res ipsa loquitur is not applicable to the facts of this case	11
Conclusion	60

Table of Authorities Cited.

Cases.

Alexander v. Cosden Pipe Line Co., 290 U.S. 484	37
Arabia v. John Hancock Mut. Life Ins. Co., 301 Mass. 397	19, 43
Asprodites v. Standard Fruit & S.S. Co., 108 Fed. (2) 728	16
Atchison, T. & S.F. Ry. Co. v. Toops, 281 U.S. 351	12
Bagnell v. Boston Elevated Ry., 247 Mass. 235	49
Baltimore & Ohio R. Co. v. Berry, 286 U.S. 272	12, 49
Boice-Perrine Co. v. Kelley, 243 Mass. 327	52
Bonner v. Texas Co., 89 Fed. (2) 291	16, 18, 41, 43
Boston Food Products Co. v. Wilson & Co., 245 Mass. 550	35, 39
Brown v. Boston & Maine R.R., 302 Mass. 90	49
Byerly v. Light & Power Co., 130 Mo. App. 593	48
Cantley v. M., K., T. R.R. Co., 353 Mo. 605	46, 47
Chicago, M. & St. P. Ry. v. Coogan, 271 U.S. 472	12
Clark v. Detroit & M. R. Co., 197 Mich. 489	50

	Page
Cochrane v. Pittsburgh & L.E. R. Co., 31 Fed. (2) 769	56, 57
Commonwealth v. Welansky, 316 Mass. 383	35
Conn. Mutual Life Ins. Co. v. Hillmon, 188 U.S. 208	55, 56
Courtney v. N.Y., N.H. & H. R.R., 213 Fed. 388	16, 20, 23
Curtin v. Boston Elevated Ry., 194 Mass. 260	15, 29
Davis v. Aetna Acceptance Co., 293 U.S. 328	36
Davis v. Castile, 257 S.W. 870	41
Doughnut Machine Co. v. Bibbey, 65 Fed. (2) 635	47
Dryden v. Western Pacific R. Co., 1 Cal. App. (2) 49	17
Dunbar v. Ferrera Bros. Inc., 306 Mass. 90	19, 34, 43
Francey v. Rutland R.R. Co., 222 N.Y. 432	20, 23
Gilchrist v. Boston Elevated Ry., 272 Mass. 346	14
Ginzler v. Birmingham, 6 Ala. App. 666	55
Gray v. Baltimore & Ohio R. Co., 24 Fed. (2) 671	16, 18
Henson v. Lehigh Valley R.R. Co., 194 N.Y. 205	17, 32
James v. Boston Elevated Ry., 201 Mass. 263	38
Kay v. Metropolitan St. Ry. Co., 163 N.Y. 447	14
Keogh v. South Buffalo Ry. Co., 233 N.Y. 31	32, 37
Kid v. Coahuila Lead & Zinc Co., 204 S.W. 284	20, 24
Klingman v. Loew's Inc., 296 N.W. 528	20, 24
Leet v. Union Pacific R. Co., 144 P. (2) 64	57
Lennon v. Rawitzer, 57 Conn. 583	17, 18
Lockwood, Admr., v. Chicago &c. Ry. Co., 55 Wis. 50	32
Lonergan v. American Ry. Ex. Co., 250 Mass. 30	16
Looney v. Metropolitan R. Co., 200 U.S. 480	12, 50, 51, 53, 59
Lynch v. N.Y., N.H. & H. R.R., 294 Mass. 152	12, 13, 15, 16, 20, 32
Massa v. Nippon Yusen Kaisha, 264 N.Y. 283	17, 18, 20, 23
McCabe v. Boston Consol. Gas Co., 314 Mass. 493	12
McDonough v. Vozzela, 247 Mass. 552	52
McNamara v. Boston & Maine R.R., 202 Mass. 491	57

Page
Mikolajczyk v. Allcutt, 102 Fed. (2) 82 50
Minihan v. Boston Elevated Ry., 197 Mass. 367 13, 38
Minneapolis & St. Louis R.R. Co. v. Gotschall, 244 U.S. 66 15
Morley Constr. Co. v. Maryland Casualty Co., 300 U.S. 185 37
Mucha v. Northeastern Crushed Stone Co., Inc., 307 Mass. 592 28
New York Central R. Co. v. Ambrose, 280 U.S. 486 20, 28, 29
Oklahoma City v. McMaster, 196 U.S. 529 35, 39
Osgood v. Los Angeles Traction Co., 137 Cal. 280 47
Palum v. Lehigh Valley R. Co., 65 F. Supp. 1010 48
Papageorge v. Boston & Maine R.R., 317 Mass. 235 34, 35, 36
Patton v. Texas & Pacific Ry. Co., 179 U.S. 658 12, 14, 15, 20, 29, 30
Payne v. Boucher, 270 Fed. 38 12, 28, 29
Peirson v. Boston Elevated Ry., 191 Mass. 223 55, 56
Pekin Wood Products Co. v. Burkhardt, 192 Ark. 1025 17
Pennsylvania R. Co. v. Chamberlain, 288 U.S. 333 12, 28, 49
Peterson v. Boston & Maine R.R., 310 Mass. 45 34
Pittsley v. Allen, 297 Mass. 83 16
Plumb v. Richmond, L. & R.R. Co., 233 N.Y. 285 15
Prondecka v. Turners Falls Power & Elec. Co., 238 Mass. 239 19, 43
Reading Co. v. Boyer, 6 Fed. (2) 185 12
Reardon v. Boston Elevated Ry., 247 Mass. 124 17
Robertson v. Chicago &c. Ry. Co., 177 Minn. 303 12, 29, 30, 32
Rogers v. Packing Co., 180 Mo. App. 227 48
Romana v. Boston Elevated Ry., 226 Mass. 532 34, 35, 36, 39

Page

San Juan Light & Transit Co. v. Requena, 224 U.S. 89.. 12, 13, 16, 17, 40, 47, 53, 60
Santa Maria v. Trotto, 297 Mass. 442 19, 43
S. E. Rand Transportation Co. v. Boston & Maine R.R., 273 Mass. 327 19, 34, 43
Showalter v. Western Pacific R. Co., 16 Cal. (2) 460 29
Southern Ry. Co. v. Stewart, 115 Fed. (2) 317 50
St. Louis &c. Ry. v. Mills, 271 U.S. 344 12, 49
Sweeney v. Erving, 228 U.S. 233 12, 13, 14, 48
Sweeting v. Penn. R. Co., 142 Fed. (2) 611 44, 45, 50
Tanona v. N.Y., N.H. & H. R.R., 301 Mass. 589 52
Tennant v. Peoria & Pekin Union Ry. Co., 321 U.S. 29 50, 51
Terminal R. Assn. of St. Louis v. Staengel, 122 Fed. (2) 271 32, 33
Texas & Pacific Ry. Co. v. Barrett, 166 U.S. 617 15
Texas & Pacific Coal Co. v. Kowsikowski, 103 Tex. 173 17, 20, 21, 28, 29, 32, 41, 42, 49, 53
Tiller v. Atlantic Coast Line R. Co., 318 U.S. 54 11
United States v. Porter Bros. & Biffle, 95 Fed. (2) 694 15, 16, 17, 28
United States v. Ten Cases, More or Less, Bred Spred, 49 Fed. (2) 87 37
Van Horn v. Pacific Refining & Roofing Co., 27 Cal. App. 105 47
Warner v. Railroad, 178 Mo. 125 48

STATUTES.

Federal Employers' Liability Act, 45 U.S.C. c. 2, sec. 51 seq. 1, 2, 9, 11
Judicial Code, sec. 240 (a), as amended by Act of Feb. 13, 1925, 28 U.S.C. sec. 347 1
28 U.S.C. sec. 225 1

Rules of Civil Procedure, Rule 75(d) 39

TEXTBOOKS.

	Page
38 Am. Jur., sec. 308, p. 1005	40
Prosser on Torts (1941 Ed.) p. 295	46
1 Shearman & Redfield, Negligence (Rev. Ed.) sec. 56	13, 14, 15, 28

Supreme Court of the United States.

October Term, 1946.

No. 88.

HELENE A. JESIONOWSKI, Administratrix,
Petitioner,
v.
BOSTON AND MAINE RAILROAD,
Respondent.

BRIEF FOR THE RESPONDENT.

Opinion Below.

The opinion of the Circuit Court of Appeals for the First Circuit, dated April 1, 1946, which appears in the record at pages 119-123, is reported in 154 Fed. (2) 703.

Jurisdiction.

The District Court of the United States had jurisdiction of the cause of action under the Federal Employers' Liability Act, U.S.C. Title 45, c. 2, §§ 51 *seq.*, the Circuit Court of Appeals had appellate jurisdiction to review by appeal the final decision of the District Court under U.S.C. Title 28, § 225; and this court has jurisdiction under U.S.C. Title 28, § 347 (Judicial Code, § 240 (a), as amended by the Act of February 13, 1925).

Statement of the Case.

This is an action of tort brought under the provisions of an Act of Congress approved April 22, 1908, entitled "An Act Relating to the Liability of Common Carriers by Railroad to Their Employees in Certain Cases" (U.S.C. Title 45, §§ 51 *seq.*), as amended, for the death of an employee of the defendant, the plaintiff's intestate, on July 1, 1944, while he was engaged in a switching operation in the defendant's freight yards near Lynn, Massachusetts (R. pp. 1-3, 4-5).

Hereinafter the petitioner, Helene A. Jesionowski, Administratrix, will be referred to as the plaintiff, and the respondent, Boston and Maine Railroad, will be referred to as the defendant.

The writ was filed October 18, 1944 (R. p. 1).

The complaint (R. pp. 1-3, 4-5) contains two counts. The first count alleges in substance that on July 1, 1944, while the plaintiff's decedent was employed as a brakeman on a train of the defendant at Lynn, Massachusetts, it became his duty to take part in a switching operation, which required him to ride upon a freight car which was one of a string of freight cars which was being pushed in upon a siding by a locomotive of the defendant; that by reason of a defect or insufficiency, due to the negligence of the defendant, in its car, track, or roadbed, the car upon which the plaintiff's decedent was riding was derailed, and as a result of the derailment the decedent was thrown from the car upon which he was riding under its wheels and instantly killed. The second count, added by amendment (R. pp. 4-5), alleges in substance that the decedent's death resulted from the derailment of the car upon which he was riding, and that the derailment resulted from negligence of the defendant, without specifying any particular negligence.

The defendant's answer appears at pages 3-4, 5-6 of the record.

The case was tried before Ford, J., and a jury on May 1 and 2, 1945 (R. p. 6), in the District Court of the United States for the District of Massachusetts.

At the close of the evidence the defendant duly and seasonably filed a motion for a directed verdict on each count (R. pp. 6-8). This motion was allowed on the first count and denied on the second count (R. pp. 6, 97), and the defendant's exception was saved (R. p. 97).

The defendant duly and seasonably requested the court to give certain instructions to the jury (R. p. 113), among which are the following:

> "6. The doctrine of *res ipsa loquitur* is not applicable to the facts of this case.
>
> "7. The plaintiff's intestate had control of the switch at the time of the accident.
>
> . . . . . .
>
> "14. There is no evidence which would warrant a finding that the derailment was due to negligence of the defendant."

These instructions the court refused to give, and to this refusal the defendant duly excepted (R. p. 109).

On the first count of the complaint the jury returned a verdict for the defendant by direction of the court (R. pp. 6, 9, 97-98), and judgment for the defendant was entered on this count (R. p. 9). On the second count of the complaint the jury returned a verdict for the plaintiff in the sum of $20,000 (R. p. 9), and judgment was entered for

the plaintiff on the second count in this sum with costs (R. p. 9).

From the judgment for the plaintiff on the second count the defendant claimed an appeal to the Circuit Court of Appeals for the First Circuit (R. pp. 9, 114), and on April 1, 1946, the Circuit Court of Appeals for the First Circuit reversed the judgment of the District Court, and ordered judgment to be entered for the defendant (R. p. 123).

The plaintiff's petition for certiorari was granted May 20, 1946.

Statement of Facts.

The only eye-witness to the accident was Harrison I. Whitney, who was called as a witness by the plaintiff (R. p. 10). At the trial Whitney testified that he was a locomotive engineer employed by the Boston and Maine Railroad; that he recalled that there was an accident about 5.30 in the morning on July 1, 1944, which was a clear day; that after he went by West Lynn he brought the train, with forty-nine cars, to a stop (R. p. 10); that Jesionowski was the brakeman, and he went back to cut off four cars; that he had been riding with the witness in the cab of the engine up to that point; that after a time he (the witness) got the go-ahead motion by lantern and started along (R. p. 11); that he continued to go ahead towards the Saugus River until he got from Jesionowski a lantern signal to stop (R. pp. 11-12, 22); that when he stopped in response to that lantern signal the front of his locomotive was at a switch point or cross-over near the Saugus River, marked "A" on a plan (R. p. 22) introduced in evidence and marked "Exhibit 1" (R. pp. 49, 111); that he then saw Jesionowski go towards the switch stand (R. pp. 12, 23);

that the switch stand was at a point on the plan marked "B"; that when Jesionowski came from that point back toward the car he (the witness) got a signal to back, and he started backing (R. pp. 12, 23); that he next saw Jesionowski *on the side of one of the freight cars*—the evidence does not show which car, or on which end of the car—and he (Jesionowski) gave a second signal to back (R. pp. 13, 23); that he (the witness) had already started backing by the time he got the second signal from Jesionowski; that in making his movements forward, in stopping, and in backing, he relied on the signals which he got from Jesionowski (R. p. 23); that he had backed about three car lengths when he saw splinters going in the air (R. pp. 13, 23); that he then stopped the locomotive within 15 or 20 feet (R. p. 15), and went across the cab to look out on the fireman's side and saw that the cars were in a U-shape; that he immediately went back on the north side to see what had taken place and found *one end of the car was on the main line and the other on the north siding*, so there was a derailment of that fourth car from the engine (R. pp. 15, 25-26); that he examined the switch (R. p. 16), and observed that the switch was set for the north siding (R. p. 17), and with reference to the switch stand he observed that the handle was down and the lock was in place but not locked; that that was the customary thing because the brakeman (Jesionowski) was going to let him out and then throw the switch again later (R. pp. 17-18); that on the day before he had used the same switch and it worked properly, and on the next day he operated a train over it and it worked properly then (R. p. 20). The witness further testified (R. p. 22) that the length of the locomotive was about 80 feet; that these freight cars were about 40 feet, with a space between the cars for coupling purposes about 18 inches (R. p. 22); that the total length of the train was about 246 feet (R. p. 31); that when he finally

stopped after the derailment, the front of the locomotive was near the switch stand, which is marked "B" on the plan (Exhibit 1, R. p. 111) (R. p. 24); that he was backing the train about 5 miles an hour (R. pp. 14, 26).

Earl M. Harvey, called by the defendant (R. p. 33), testified (R. p. 33) that he was a civil engineer for the Boston and Maine Railroad; that the plan (Exhibit 1, R. p. 111) was made by him, based upon measurements and a survey which he personally made (R. p. 34); that the frog to the left or towards Lynn from the switch point marked "B" is 75½ feet from the point marked "B" (R. p. 36); that the switch point, operated by means of the switching device (R. p. 39), was 15 feet long (R. pp. 37, 38, 40); that the rear car of the string of four cars was 44 feet 9 inches from the end of one knuckle to the other knuckle (R. pp. 43, 44), and the shortest distance between the wheels, on car No. 72643 (the car which was derailed), from truck to truck, was 25 feet 9 inches (R. p. 42); that the distance between the cross-over marked "A" on the plan (Exhibit 1, R. p 111) and the switch point marked "B" on the plan is 224 feet, and that was based on his measurements (R. p. 35).

John F. Sweeney, the defendant's trainmaster (R. p. 62), testified (R. p. 62) that on the morning of the accident in which Mr. Jesionowski was involved he went to the scene of the accident, and arrived there about 6.20; that he found the rear truck of the leading car, as it was backed, was on the west-bound main track; *that the leading truck was not derailed* (R. p. 63); that the trucks of that car nearest the engine were derailed (R. p. 63); that he noticed some flange marks on the ties, *which commenced 6 or 8 feet west of the frog* (R. p. 66); that he had examined a couple of hundred derailments, and he had never known of one

being caused by a spring frog (R. p. 69); that he operated the switch both ways, and found that it operated perfectly; that he observed the condition of the roadbed and track and it seemed all right (R. p. 67).

Francis T. Flynn, the defendant's assistant division engineer (R. p. 72), testified (R. p. 73) that when he got there on the morning of the accident he saw that the lead trucks of the first car towards Lynn were on the westbound tracks and the rear trucks of that car were on the inside of the north rail of the north siding, and the first trucks of the next car were also derailed inside the south rail of the north siding (R. p. 73); that as a result of seeing these cars there he went to the switch stand, indicated on the plan near "B" (Exhibit 1, R. p. 111); that it was a hand switch; that he took the switch stand and threw the lever to open up the line to see whether the switch points fitted close to the stock rail and he found that in both cases they did (R. p. 75); that the switch points were 15 feet long (R. p. 75); that he found the tip of the switch point was close against the main-line track; that he then tried it on the side track and threw the switch back to its original position and it fitted again; that he found when he threw the switch back and forth that it worked all right (R. p. 75); that he could not find any derailment marks on the main line, so he went down on the side track and found wheel marks on the top of the rail at a distance of 69 feet from the switch point marked "B," going towards Lynn, on the switch-point side of the frog; that he traced those marks and found they continued 170 feet from the first mark 69 feet from the switch point (R. pp. 76-77), which would be about 6½ feet before you reached the frog going from the point of the switch (R. p. 83); that the two front bolts on the frog were damaged and the spring bolt was

dented (R. p. 83); that the wheels when they became derailed passed over and made marks where they passed over the bolt or spring and continued on to the marks beyond it; that the wheels of the car clipped the bolt heads (R. p. 85).

John F. Brady, a section foreman for the Boston and Maine Railroad (R. p. 91), testified (R. pp. 91-92) that he went to the scene of the accident on the morning it happened; that the first thing he did was to examine the switch; that he moved it himself and found the operation of the switch "was O.K."; that the points of the switch all fitted close to the stock rail; that no repairs to that switch had been made after the accident.

Leonard J. Casey, the defendant's track supervisor (R. p. 93), testified (R. p. 94) that he went to the scene of the accident on the morning the accident happened; that the first thing he did was to go to the switch stand and make a check on it; that he threw the switch back and forth and left it in its normal position; that he found the condition of the switch "was 100%, in very good shape" (R. p. 94); that he went to work and checked the roadbed and also the track; that 6 to 8 feet ahead of the point of the frog he found a mark on the rails and also some marks on the ties; that that mark continued right along the side track for quite a little distance (R. p. 94); that the only damage he found on the frog was right at the joint where it locks into the running rail; two of the plates were marked there; that there was a nick on the top of the nut, a flange mark, and the mark continued on and hit the spring of the frog, which is the bolt that goes through the frog, and bent that (R. p. 95).

Question Presented.

The plaintiff's specifications of errors (Plaintiff's Brief, pp. 5 and 6) raise one fundamental question:

WAS THE CIRCUIT COURT OF APPEALS IN ERROR IN RULING THAT THE DOCTRINE OF RES IPSA LOQUITUR IS NOT APPLICABLE TO THE FACTS OF THIS CASE?

Summary of the Argument.

THE CIRCUIT COURT OF APPEALS WAS NOT IN ERROR IN RULING THAT THE DOCTRINE OF RES IPSA LOQUITUR IS NOT APPLICABLE TO THE FACTS OF THIS CASE.

I. Under the Federal Employers' Liability Act liability arises from negligence, and that negligence must be the cause of the injury.

The burden of proving negligence is on the plaintiff.

II. Since there was no direct evidence of negligence, the plaintiff invokes the doctrine of *res ipsa loquitur*.

1. This doctrine has been defined in a number of cases.

2. Application of the doctrine has often been considered by courts of last resort.

(*a*) Application to passenger cases.
(*b*) Application to employee cases.
(*c*) Limitation in application of the doctrine.

III. There are three reasons why the doctrine is not applicable to the case at bar.

1. The first reason is that, in a suit by an employee against an employer, the doctrine is never applicable unless the instrumentality or instrumentalities involved are, at

the time of the accident, under the *exclusive control* of the defendant.

In the case at bar the instrumentalities involved were not under the exclusive control of the defendant.

2. The second reason is that the doctrine does not apply in cases in which the accident *may have happened without fault on the part of the employer.*

(*a*) In the case at bar the plaintiff's uncontradicted evidence shows, not only that the accident *may have happened through no negligence of the defendant, but that it probably resulted from the decedent's own conduct.*

(*b*) The plaintiff's burden of proof has not been sustained, since the inference of negligence is not the only inference that can fairly and reasonably be drawn from the circumstances surrounding the derailment.

3. The third reason is that the jury's verdict for the defendant on the first count of the complaint renders the doctrine inapplicable under the second count.

(*a*) The second count alleges general negligence. But the court instructed the jury that the issues under the second count were whether there was negligent operation of the cars or negligence in allowing defects in its instrumentalities to exist. In the absence of objection or exception, this became the law of the case.

(*b*) Any issue under the second count as to negligence predicated on a defect in the carrier's instrumentalities is foreclosed by the jury's verdict for the defendant on the first count.

The jury's verdict for the defendant on the first count is equivalent to a special finding of fact against the plaintiff's contention that there were any defects in the car, track or roadbed, including the frog and the switch.

(*c*) If the direction of a verdict for the defendant be regarded as a ruling of law, the same result is reached as if the jury's verdict be treated as a finding of fact, since no objection was made or exception taken.

(*d*) The plaintiff cannot question the conclusiveness of the adverse finding under the first count of the complaint in the absence of a cross-appeal.

(*e*) The result is that the jury's verdict on the first count and the judge's instruction to the jury eliminated under the second count all ground of complaint except possible negligence in the *operation of the train*, which is *particular* negligence. And the doctrine of *res ipsa loquitur* can never be invoked to supply the place of evidence of *particular* negligence.

For each and all of the foregoing reasons it is submitted that the Circuit Court of Appeals was not in error in ruling that the doctrine of *res ipsa loquitur* is not applicable to the facts of this case.

IV. The plaintiff's arguments do not support her contention that the Circuit Court of Appeals was in error as specified.

Argument.

THE CIRCUIT COURT OF APPEALS WAS NOT IN ERROR IN RULING THAT THE DOCTRINE OF RES IPSA LOQUITUR IS NOT APPLICABLE TO THE FACTS OF THIS CASE.

I. Under the Federal Employers' Liability Act (U.S.C. Title 45, c. 2, § 51) liability arises from negligence, and that negligence must be the cause of the injury.

Tiller v. *Atlantic Coast Line R. Co.*, 318 U.S. 54, 67.

Atchison, T. & S.F. Ry. Co. v. *Toops*, 281 U.S. 351, 354-355.

Baltimore & Ohio R. Co. v. *Berry*, 286 U.S. 272, 276.

The burden of proving negligence is on the plaintiff.

Pennsylvania R. Co. v. *Chamberlain*, 288 U.S. 333, 343.

Baltimore & Ohio R. Co. v. *Berry*, 286 U.S. 272, 276.

St. Louis &c. Ry. v. *Mills*, 271 U.S. 344, 347.

Looney v. *Metropolitan R. Co.*, 200 U.S. 480, 487-488.

Chicago, M. & St. P. Ry. v. *Coogan*, 271 U.S. 472, 478.

Patton v. *Texas & Pacific Ry. Co.*, 179 U.S. 658, 663.

Reading Co. v. *Boyer*, 6 Fed. (2) 185, 186.

Payne v. *Boucher*, 270 Fed. 38, 40.

Lynch v. *N.Y., N.H. & H. R.R.*, 294 Mass. 152, 161.

Robertson v. *Chicago &c. Ry. Co.*, 177 Minn. 303, 306.

II. Since there was no direct evidence of negligence, the plaintiff invokes the doctrine of *res ipsa loquitur*.

1. This doctrine has been defined in a number of cases.

Sweeney v. *Erving*, 228 U.S. 233, 240.

San Juan Light & Transit Co. v. *Requena*, 224 U.S. 89, 98-99.

McCabe v. *Boston Consol. Gas Co.*, 314 Mass. 493, 496.

Lynch v. *N.Y., N.H. & H. R.R.*, 294 Mass. 152.
Minihan v. *Boston Elevated Ry.*, 197 Mass. 367.
1 Shearman & Redfield, Negligence (Rev. Ed.) pp. 150, 152, § 56.

In *Sweeney* v. *Erving*, 228 U.S. 233, the court said at page 240:

> "In our opinion, *res ipsa loquitur* means that the facts of the occurrence warrant the inference of negligence, not that they compel such an inference; that they furnish circumstantial evidence of negligence where direct evidence of it may be lacking, but it is evidence to be weighed, not necessarily to be accepted as sufficient; that they call for explanation or rebuttal, not necessarily that they require it; that they make a case to be decided by the jury, not that they forestall the verdict. *Res ipsa loquitur, where it applies,* does not convert the defendant's general issue into an affirmative defense. When all the evidence is in, the question for the jury is, whether the preponderance is with the plaintiff." (Italics ours.)

In *San Juan Light & Transit Co.* v. *Requena*, 224 U.S. 89, 98-99, the court said:

> ". . . when a thing which causes injury, without fault of the injured person, is shown to be under the *exclusive control of the defendant*, and the injury is such as in the ordinary course of things does not occur if the one having such control uses proper care, it affords reasonable evidence, in the absence of explanation, that the injury arose from the defendant's want of care." (Italics ours.)

The rule deducible from all the cases is well stated in 1 Shearman & Redfield, Negligence (Rev. Ed.) p. 152, § 56:

> "Circumstantial evidence is insufficient . . . where the circumstances are consistent with freedom from wrong. The doctrine of res ipsa loquitur, which is 'a common-sense appraisal of the probative value of circumstantial evidence', requires evidence which shows at least the *probability* that a particular accident could not have occurred without legal wrong by the defendant. *The inference of negligence must be the only one* that can fairly and reasonably be drawn from the attendant circumstances." (Italics ours.)

2. Application of the doctrine has often been considered by courts of last resort.

(*a*) There is no difficulty in applying the doctrine in the case of a passenger injured by reason of a derailment. This is so both because of the high degree of care owed to a passenger and because of the fact that the passenger has no control of the instrumentalities causing his injury.

Kay v. *Metropolitan St. Ry. Co.*, 163 N.Y. 447, 453 (cited with approval in *Sweeney* v. *Erving*, 228 U.S. 233, 240-241).

Gilchrist v. *Boston Elevated Ry.*, 272 Mass. 346.

See *Patton* v. *Texas & Pacific Ry. Co.*, 179 U.S. 658, and cases cited at page 663.

1 Shearman & Redfield, Negligence (Rev. Ed.) p. 152.

(*b*) There is a difference, however, in the application of the doctrine in employee cases.

Patton v. *Texas & Pacific Ry. Co.*, 179 U.S. 658, 663.

Texas & Pacific Ry. Co. v. *Barrett*, 166 U.S. 617.
Minneapolis & St. Louis R.R. Co. v. *Gotschall*, 244 U.S. 66, 67.
Lynch v. *N.Y., N.H. & H. R.R.*, 294 Mass. 152, 162.
Curtin v. *Boston Elevated Ry.*, 194 Mass. 260, 264.

In *Patton* v. *Texas & Pacific Ry. Co.*, 179 U.S. 658, the court said at page 663:

". . . while in the case of a passenger the fact of an accident carries with it a presumption of negligence on the part of the carrier, a presumption which in the absence of some explanation or proof to the contrary is sufficient to sustain a verdict against him, for there is *prima facie* a breach of his contract to carry safely, . . . *a different rule obtains as to an employé.* The fact of accident carries with it no presumption of negligence on the part of the employer, and it is an affirmative fact for the injured employé to establish that the employer has been guilty of negligence." (Italics ours.)

(*c*) The doctrine of *res ipsa loquitur* is a doctrine of limited application.

United States v. *Porter Bros. & Biffle*, 95 Fed. (2) 694, 698.
Plumb v. *Richmond, L. & R.R. Co.*, 233 N.Y. 285, 288.
1 Shearman & Redfield, § 56, p. 150.

In *United States* v. *Porter Bros. & Biffle*, 95 Fed. (2) 694, the court said at page 698:

"The doctrine of res ipsa loquitur is *restricted in its application* to cases where the defendant had *ex-*

clusive control of the thing which caused the injury, the party injured was without fault, and the injury was such as in the ordinary course of things would not have occurred if the one having such control had used proper care. In the absence of an explanation in such cases, the court may presume that the injury arose from the defendant's want of care, but *the presumption does not reasonably follow unless all other conclusions are fairly excluded.*" (Italics ours.)

III. There are three reasons why the doctrine of *res ipsa loquitur* is not applicable to the case at bar.

1. The first reason is that, in a suit by an employee against an employer, the doctrine is never applicable *unless the instrumentality or instrumentalities involved are, at the time of the accident, under the exclusive control, direction, management, or operation of the defendant.*

San Juan Light & Transit Co. v. *Requena*, 224 U.S. 89, 98-99.

United States v. *Porter Bros. & Biffle*, 95 Fed. (2) 694, 698.

Bonner v. *Texas Co.*, 89 Fed. (2) 291, 294.

Gray v. *Baltimore & Ohio R. Co.*, 24 Fed. (2) 671.

Asprodites v. *Standard Fruit & S.S. Co.*, 108 Fed. (2) 728, 729.

Courtney v. *N.Y., N.H. & H. R.R.*, 213 Fed. 388, 390.

Lynch v. *N.Y., N.H. & H. R.R.*, 294 Mass. 152, 162.

Pittsley v. *Allen*, 297 Mass. 83, 85.

Lonergan v. *American Ry. Ex. Co.*, 250 Mass. 30, 36.

Reardon v. *Boston Elevated Ry.*, 247 Mass. 124, and cases collected.

Massa v. *Nippon Yusen Kaisha*, 264 N.Y. 283, 284-285.

Henson v. *Lehigh Valley R.R. Co.*, 194 N.Y. 205.

Lennon v. *Rawitzer*, 57 Conn. 583, 587.

Texas & Pacific Coal Co. v. *Kowsikowsiki*, 103 Tex. 173, 174-175.

Dryden v. *Western Pacific R. Co.*, 1 Cal. App. (2) 49.

Pekin Wood Products Co. v. *Burkhardt*, 192 Ark. 1025.

In *San Juan Light & Transit Co.* v. *Requena*, 224 U.S. 89, the court said at pages 98-99:

> "... when a thing which causes injury, without fault of the injured person, is shown to be under the *exclusive control of the defendant*, and the injury is such as in the ordinary course of things does not occur if the one having such control uses proper care, it affords reasonable evidence, in the absence of an explanation, that the injury arose from the defendant's want of care." (Italics ours.)

In *United States* v. *Porter Bros. & Biffle*, 95 Fed. (2) 694, the court said at page 698:

> "The doctrine of res ipsa loquitur is restricted in its application to cases where *the defendant had exclusive control* of the thing which caused the injury, the party injured was without fault, and the injury was such as in the ordinary course of things would not have occurred if the one having such *control* had used

proper care. In the absence of an explanation in such cases, the court may presume that the injury arose from the defendant's want of care, but the presumption does not reasonably follow unless all other conclusions are fairly excluded." (Italics ours.)

In *Bonner* v. *Texas Co.*, 89 Fed. (2) 291, the court said at page 294:

"Res ipsa loquitur does not help, for that doctrine applies only when the instrumentalities causing injury are shown to have been *wholly in the care of defendant*, and not to have been meddled with by the person injured or outsiders." (Italics ours.)

In *Gray* v. *Baltimore & Ohio R. Co.*, 24 Fed. (2) 671, the court said at page 673:

"The switch was taken under the *control of the negro* at the time he sawed the lock, and from that time until the wreck *it cannot be said that it was solely under the control of the defendant.*" (Italics ours.)

In *Massa* v. *Nippon Yusen Kaisha*, 264 N.Y. 283, the court said at pages 284-285:

"*The first item of proof necessary to bring this rule into action is that the thing is shown to be under the management of the defendant.*" (Italics ours.)

In *Lennon* v. *Rawitzer*, 57 Conn. 583, the court said at page 587:

". . . there are several conditions which are essential to lay the foundation for any presumption. One is that the thing must be *under the management of the*

defendant or his servants. Here the actual management at the time was controlled by the plaintiff, which would at least require caution in applying the rule, lest the plaintiff's own carelessness be visited on the defendants." (Italics ours.)

In the case at bar the evidence shows that the switch involved was a hand switch (R. pp. 16-17, 39, 75), operated by the decedent (R. pp. 12, 23), and there is no evidence that anyone touched the switch after the decedent had thrown it for the switching movement of the train onto the side track. The plaintiff's only witness to the accident, Whitney, the locomotive engineer, testified (R. p. 17) that after the accident he examined the switch and observed that the switch was set for the north siding, and with reference to the switch stand he observed that the handle was down and the lock was in place but not locked; that that was the customary thing because the brakeman (Jesionowski) was going to let him out and then throw the switch again later (R. pp. 17-18). Accordingly the judge of the District Court instructed the jury (R. p. 104): *"Now there is no question that the deceased had control of the switch for the purpose of directing the movement of the cars . . ."*

Since there was no objection or exception, this became the law of the case.

S. E. Rand Transportation Co. v. *Boston & Maine R.R.*, 273 Mass. 327, 329, 332.
Dunbar v. *Ferrera Bros. Inc.*, 306 Mass. 90, 91.
Prondecka v. *Turners Falls Power & Elec. Co.*, 238 Mass. 239, 241.
Arabia v. *John Hancock Mut. Life Ins. Co.*, 301 Mass. 397, 401.
Santa Maria v. *Trotto*, 297 Mass. 442, 446-447.

On the facts just stated, the doctrine of *res ipsa loquitur* is not applicable to this case, and the Circuit Court of Appeals was correct in the following statement (R. p. 123):

> "Thus an essential element of the principle of *res ipsa loquitur* is that the defendant have exclusive control of the thing causing the injury. Such essential element is not clear in this case."

2. The second reason is that the doctrine does not apply in cases in which the accident *may have happened without fault on the part of the employer.*

New York Central R. Co. v. *Ambrose,* 280 U.S. 486, 490.

Patton v. *Texas & Pacific Ry. Co.,* 179 U.S. 658, 663-664.

Texas & Pacific Coal Co. v. *Kowsikowsiki,* 103 Tex. 173, 174-175.

Courtney v. *N.Y., N.H. & H. R.R.,* 213 Fed. 388, 390 (cited with approval in *Lynch* v. *N.Y., N.H. & H. R.R.,* 294 Mass. 152, 163).

Massa v. *Nippon Yusen Kaisha,* 264 N.Y. 283, 284-285.

Francey v. *Rutland R.R. Co.,* 222 N.Y. 482, 485-486.

Klingman v. *Loew's Inc.,* 296 N.W. 528, 531.

Kid v. *Coahuila Lead & Zinc Co.,* 204 S.W. 284, 286, 287, and cases cited.

In *New York Central R. Co.* v. *Ambrose,* 280 U.S. 486, the court said at page 490:

> "The utmost that can be said is, that *the accident may have resulted from any one of several causes,* for some of which the company was responsible, and for some of which it was not. This is not enough. See

Patton v. *Texas & Pacific R. Co.*, 179 U. S. 658, where, at page 663, this court said: 'The fact of accident carries with it no presumption of negligence on the part of the employer, and it is an affirmative fact for the injured employé to establish that the employer has been guilty of negligence. . . . *it is not sufficient for the employé to show that the employer may have been guilty of negligence—the evidence must point to the fact that he was.* And where the testimony leaves the matter uncertain and shows that any one of half a dozen things may have brought about the injury, for some of which the employer is responsible and for some of which he is not, it is not for the jury to guess between these half a dozen causes and find that the negligence of the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion. If the employé is unable to adduce sufficient evidence to show negligence on the part of the employer, it is only one of the many cases in which the plaintiff fails in his testimony, and no mere sympathy for the unfortunate victim of an accident justifies any departure from settled rules of proof resting upon all plaintiffs.'" (Italics ours.)

In *Texas & Pacific Coal Co.* v. *Kowsikowsiki*, 103 Tex. 173 (*a case directly in point*), the court said at pages 174-175:

"'Where the particular thing causing the injury has been shown to be under the management of the defendant, or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation, that the accident arose from want of care.'

"This would probably be an eminently just conclusion if the assumption upon which it is founded were just, viz., that the evidence shows that the particular thing which caused the death in question was under the exclusive management and control of the defendant. The derailment of the car, unexplained, is a fact which by its very nature may be admitted to suggest something amiss, a want of proper precaution somewhere. *But what was the cause of the derailment?* Until we can answer that question, we think it must be admitted that it is not shown by the evidence that the particular thing which caused this injury was in the exclusive management of the defendant. If everything that could reasonably be assigned as the cause of the derailment had been wholly under the control of servants of defendant *other than the deceased himself*, it might be inferred that the cause, whatever it was, consisted in some negligent act or omission of theirs. *But we have a track, with its switches, and a motor car, defects in, or negligent management of, any of which might have brought about that which happened. The deceased himself had a hand in the management of the switches, and also in controlling the movements of the car, in so far as it depended on the giving of signals.* Negligence is not to be imputed either to him or to the defendant's other servants without proof; and a state of facts in which the cause of the accident cannot be found does not warrant a conclusion that one, rather than the other, produced it. *We cannot presume in favor of one against the other. Evidence must be brought by a plaintiff, having the burden of proof, sufficient to justify an inference of negligence on the part of the defendant, and none such can be drawn from an occurrence which, while indicating negligence some-*

where, is as consistent with the hypothesis that it was his own, or that of one in whose right he sues, as it was that of the other party." (Italics ours.)

In *Courtney* v. *N.Y., N.H. & H. R.R.*, 213 Fed. 388, the court said at page 390:

"The maxim res ipsa loquitur does not apply where the accident *might have been due to improper handling* as well as to improper furnishing the thing causing the accident." (Italics ours.)

In *Massa* v. *Nippon Yusen Kaisha*, 264 N.Y. 283, the court said at page 285:

"There is no presumption that the defendant was lacking in proper care in furnishing proper appliances when *the accident might have happened* through the carelessness of some member of the *stevedore's gang.*" (Italics ours.)

In *Francey* v. *Rutland R.R. Co.*, 222 N.Y. 482, the court said at pages 485-486:

"The mere happening of the accident did not necessarily exclude the inference that it might have been caused by the negligence of the plaintiff, or without any negligence at all. It was, therefore, necessary for the plaintiff to supplement the proof of the accident with evidence tending to show that it resulted from the failure of the defendant to exercise ordinary care, either in the selection of the engine or in keeping it in reasonably safe repair.

"In the present case the proof at the conclusion of the evidence was such that *the jury might have found*

the accident was due to either one of two causes—negligence on the part of defendant in failing to keep the locomotive in repair, or to the negligence of the plaintiff in letting cold water into the boiler in the condition in which it was at the time the explosion took place. Before the plaintiff could recover, therefore, the burden was upon him to prove that the accident was due *solely* to the first cause. If it were just as probable that the explosion was due to one cause as the other, then he necessarily must fail in the action." (Italics ours.)

In *Klingman* v. *Loew's Inc.*, 296 N.W. 528 (Minn.), the court said at page 531:

"The circumstances must *exclude* any reasonable probability that the fault of the one seeking to invoke it (the doctrine of *res ipsa loquitur*) contributed to the result of which he complains."

In *Kid* v. *Coahuila Lead & Zinc Co.*, 204 S.W. 284 (Mo.), the court said:

"Where the evidence is circumstantial only and reveals a state of facts from which the inference could as reasonably be drawn that the accident was due to a cause or causes other than [illegible]e tainted with the defendant's negligence, then the plaintiff cannot recover. *Wilkerson* v. *Railroad Co.*, 140 Mo. App. 306, 320.

"In *Byerly* v. *Light & Power Co.*, 130 Mo. App. 593, the court said: 'Where the evidence shows the injury *may have been caused* by the negligent act, but in its aspect most favorable to the plaintiff is just as consistent with the inference that *the injury might have been produced by another cause*, to send the case to the jury would be to accord them the right to make an

arbitrary choice between two equally probable, but unproved conclusions, and thus the verdict, if for the plaintiff, would be based not entirely on evidence, but in part on mere speculation and conjecture. This would mean a reversal of the rule imposing the burden of proof on the plaintiff, since the defendant, in order to prevent the jury from making him the victim of conjecture would be forced to assume the burden of showing that his negligence did not produce the injury.'

"*Where there are two or more possible causes for an accident,* each shown by circumstantial evidence only, and the one might just as reasonably and certainly be inferred from the evidence as the other, then the jury cannot be allowed to attribute it to the one tainted with negligence rather than the other, for to do so is mere speculation. This is merely an application of the oft-repeated rule stated in *Warner* v. *Railroad,* 178 Mo. 125, 133, that: 'If the injury *may have resulted from one of two causes,* for one of which and not the other, the defendant is liable, the plaintiff must show with reasonable certainty that the cause for which the defendant is liable produced the result, and if the evidence leaves it to conjecture, the plaintiff must fail in his action.' "

And at page 287:

"The rule which we applied is also stated in *Rogers* v. *Packing Co.,* 180 Mo. App. 227, 236, as follows: 'In a case where the injury *might have resulted from one of several causes,* for one of which the defendant is liable and for the others he is not liable, it is incumbent upon the plaintiff to prove his case by showing that the injury arose from that cause for which the defendant is liable.' "

(*a*) In the case at bar the plaintiff's uncontradicted evidence shows, not only that the accident *may have happened through no negligence of the defendant, but that it probably resulted from the decedent's own conduct.* The plaintiff's witness Whitney, the locomotive engineer (R. p. 10), the only eye-witness to the accident, testified (R. pp. 11, 22) that Jesionowski, the brakeman, had been riding with him in the cab of the engine, and he went back to cut off four cars so he then had four freight cars and a locomotive which were to go forward toward the Saugus River (R. p. 22); that after Jesionowski had cut the four cars off he (the witness) received a lantern signal to go ahead (R. pp. 11, 22), and he continued to go ahead towards the Saugus River until he got from Jesionowski a signal to stop; that when he stopped in response to that lantern signal the front of his locomotive was at a switch point or cross-over near the Saugus River at the point marked "A" on the plan (Exhibit 1, R. p. 111) (R. p. 22). The witness Whitney further testified (R. p. 22) that the length of the locomotive was about 80 feet and those freight cars were about 40 feet, with a space between the cars for coupling purposes about 18 inches (R. p. 22); that the total length of the train was about 246 feet (R. p. 31); that when he finally came to a stop, after the derailment, the front of the locomotive was near the switch stand, which is marked "B" on the plan (Exhibit 1, R. p. 111) (R. p. 24); that he got off the locomotive and went back and found one end of the car was on the main line and the other end was on the north siding, so there was a derailment of that fourth car from the engine (R. pp. 15, 25-26); that he examined the switch (R. p. 16) and observed that the switch was set for the north siding (R. p. 17), and with reference to the switch stand he observed that the handle was down and the lock was in place but not locked; that that was the customary thing *because the*

brakeman (Jesionowski) *was going to let him out and then throw the switch again later* (R. pp. 17-18); that in making the movements forward, in stopping, and in backing he relied on the signals he got from Jesionowski (R. p. 23). There was evidence that the distance between the cross-over marked "A" on the plan (Exhibit 1, R. p. 111) and the switch stand marked "B" on the plan was 224 feet (R. p. 35). Mathematical calculation shows that with the front of the locomotive stopped at point "A" in response to Jesionowski's signals, with the over-all length of the engine and four cars about 246 feet (R. p. 31), the rear of the last car would be 22 feet beyond the switch toward Lynn, that is, short of the switch. The switch point was 15 feet long (R. pp. 37, 38); on the freight car which was derailed the distance between the two sets of trucks was 25 feet 9 inches (R. p. 42); and the length of this freight car was 44 feet 9 inches (R. p. 43). There was sufficient space underneath this last car for the switch point to operate easily, and the probability is that while the car was in this position, with the wheels still on the main track straddling the switch point, Jesionowski threw the hand switch and then gave the motion to back. The result of this operation would be that the lead trucks would back along the main track—*and it is significant that these lead trucks were not derailed* (R. p. 15, Q. 94; p. 26, X-Q. 223; p. 50, Q. 12; p. 63, Q. 17-18; p. 73, Q. 24)—while the other trucks and the cars following would back along the north siding. In this way the rear trucks of the lead car would become derailed; and this is precisely what the evidence shows happened, since the marks of derailment commenced on the switch-point side of the frog (R. p. 77), 6 to 8 feet *ahead of the frog* (R. pp. 66, 94), or 69 feet beyond the switch toward Lynn and continued for 170 feet beyond (R. pp. 76-77).

Thus the plaintiff's evidence shows, not only that the derailment *may have happened without negligence on the part of the defendant, but that it probably resulted from the conduct of the decedent, who operated the switch and controlled the situation.* The decedent signaled the engineer where to stop before he threw the hand switch, and after throwing the switch he gave the engineer the motion to back (R. pp. 12-13, 22-23).

This explanation, based upon the physical facts and simple mathematical calculations, affords a reasonable explanation of the derailment and rebuts any inference of negligence on the part of the defendant, since under the doctrine of *res ipsa loquitur "the inference of negligence must be the only one that can fairly and reasonably be drawn from the attendant circumstances."*

1 Shearman & Redfield, Negligence (Rev. Ed.) p. 152.

United States v. *Porter Bros. & Biffle*, 95 Fed. (2) 694, 698.

(*b*) Since, therefore, the inference of negligence of the defendant is not the only inference that can fairly and reasonably be drawn from the circumstances surrounding the derailment, the plaintiff has failed to sustain her burden of proof.

Texas & Pacific Coal Co. v. *Kowsikowsiki*, 103 Tex. 173, 175.

Payne v. Boucher 270 Fed. 38, 40.

New York Central R. Co. v. *Ambrose*, 280 U.S. 486, 489-490.

Pennsylvania R. Co. v. *Chamberlain*, 288 U.S. 333.

Mucha v. *Northeastern Crushed Stone Co., Inc.*, 307 Mass. 592, 597.

Curtin v. *Boston Elevated Ry.*, 194 Mass. 260, 264.

Robertson v. *Chicago &c. Ry. Co.*, 177 Minn. 303, 306.

Showalter v. *Western Pacific R. Co.*, 16 Cal. (2) 460.

Patton v. *Texas & Pacific Ry. Co.*, 179 U.S. 658, 663.

In *Texas & Pacific Coal Co.* v. *Kowsikowsiki*, 103 Tex. 173 (*a case directly in point*), the court said at pages 174-175:

> "We cannot presume in favor of one against the other. Evidence must be brought by a plaintiff, having the burden of proof, sufficient to justify an inference of negligence on the part of the defendant, and none such can be drawn from an occurrence which, while indicating negligence somewhere, is as consistent with the hypothesis that it was his own, or that of one in whose right he sues, as it was that of the other party."

In *Payne* v. *Boucher*, 270 Fed. 38 the court said at page 40:

> "Negligence of the employer is an affirmative fact to be established by the one speaking for the deceased employee. . . . Evidence that the employer *may have been guilty of negligence* is not sufficient."

In *New York Central R. Co.* v. *Ambrose*, 280 U.S. 486, the court said at pages 489-490:

> "In any view of the matter, the respondent (plaintiff) upon whom lay the burden, completely failed to prove that the accident was proximately due to the

negligence of the company. It follows that the verdict rests only upon speculation and conjecture, and can not be allowed to stand. . . .

"*The utmost that can be said is, that the accident may have resulted from any one of several causes, for some of which the company was responsible, and for some of which it was not. This is not enough.* See *Patton* v. *Texas & Pacific R. Co.*, 179 U.S. 658, . . . 663." (Italics ours.)

In *Robertson* v. *Chicago &c. Ry. Co.*, 177 Minn. 303, the court said at page 306:

"Verdicts cannot rest on conjecture. The burden was on plaintiff to show that the accident resulted from defects in the car. It is not enough to show that there may have been defects. The evidence must go further and justify an inference that the accident resulted from the cause alleged rather than from some other cause. *If it is equally probable that the accident resulted from some cause other than the negligence of the defendant, there can be no recovery.* To warrant a recovery the evidence must furnish a reasonable basis for a finding that the accident is more likely to have resulted from the negligence alleged than from other causes." (Italics ours.)

In *Patton* v. *Texas & Pacific Ry. Co.*, 179 U.S. 658, the court said at pages 663-664:

"The fact of accident carries with it no presumption of negligence on the part of the employer, and it is an affirmative fact for the injured employé to establish that the employer has been guilty of negligence. *Texas & Pacific Railway* v. *Barrett*, 166 U. S. 617. Second. That in the latter case it is not sufficient for the em-

ployé to show that the employer may have been guilty of negligence—the evidence must point to the fact that he was. And where the testimony leaves the matter uncertain and shows that any one of half a dozen things may have brought about the injury, for some of which the employer is responsible and for some of which he is not, it is not for the jury to guess between these half a dozen causes and find that the negligence of the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion. If the employé is unable to adduce sufficient evidence to show negligence on the part of the employer, it is only one of the many cases in which the plaintiff fails in his testimony, and no mere sympathy for the unfortunate victim of an accident justifies any departure from settled rules of proof resting upon all plaintiffs."

In this connection the Circuit Court of Appeals in its opinion said (R. p. 122):

"The 'thing' which caused the injury in our case was within the confines of a compound of several elements, including the stopping of the train to begin the switching, the giving of the signals, the throwing of the switch, the backing of the train, the condition of the track and track bed, the switch mechanism, the car wheel flanges and other rolling stock equipment. In this compound of elements the railroad corporation was not in exclusive control. Jesionowski was in control of important elements. In a very practical sense he, and not the corporation, was in control of very important elements, for he alone was in a position to observe; and it was his duty to observe and require the train to pull forward far enough for all of the

wheels of the fourth car to clear the switch points before signaling the engineer to stop the forward movement, and the same duty continued after throwing the switch and before giving the signal to back.

"The thing that caused the injury could have been Jesionowski's fault, or it could have been the railroad corporation's fault. *It was the jury's duty to determine the cause of the accident, and since it must make that determination out of a set of facts wherein either one or both of the actors may have been at fault, it must do so without the aid of the doctrine of res ipsa loquitur.*"

This statement of the Circuit Court of Appeals is based upon the decisions of this court and other courts of last resort. A case directly in point on the facts is *Texas & Pacific Coal Co.* v. *Kowsikowsiki,* 103 Tex. 173, 174-175, which is cited with quotations on pages 21-23 of this brief.

Accordingly it is well settled that the mere derailment of a car is not evidence of negligence which would warrant recovery by an injured employee.

Texas & Pacific Coal Co. v. *Kowsikowsiki,* 103 Tex. 173, 174-175.

Henson v. *Lehigh Valley R.R. Co.,* 194 N.Y. 205.

Keogh v. *South Buffalo Ry. Co.,* 233 N.Y. 31.

Lockwood, Admr., v. *Chicago &c. Ry. Co.,* 55 Wis. 50, 53.

Robertson v. *Chicago &c. Ry. Co.,* 177 Minn. 303, 306.

Lynch v. *N.Y., N.H. & H. R.R.,* 294 Mass. 152, 162.

The case of *Terminal R. Assn. of St. Louis* v. *Staengel,* 122 Fed. (2) 271, is clearly distinguishable. In that case the

derailment was caused by an automatic switch, controlled from a switch tower by a servant of the defendant, and not, as in the case at bar, a hand switch operated by the intestate himself. Moreover, in the *Staengel* case all the cars of the freight train had safely passed the switch except the rear wheels of the last car, when concededly the switch jumped. From these facts it could be inferred either that the switchman in the tower threw the lever too soon or that there was some defect in the automatic switch which caused the derailment. From either of these causes negligence of the defendant could be inferred.

In this connection the court said at page 275:

> "In short, this evidence showed an abnormal action of the switch, which action defendant's evidence showed could not have happened with normal functioning and which defendant could not account for nor offer any explanation.
>
> "Even if we take all this evidence as true, it is clear that there must have been some defect in these switch instrumentalities because it did shift to the 11th Street track within a very few seconds after the front trucks of the last car passed over it."

3. The third reason why *res ipsa loquitur* is not applicable is that the jury's verdict for the defendant on the first count of the complaint (R. pp. 9, 98) renders the doctrine inapplicable under the second count.

(*a*) The second count of the complaint, added by amendment (R. pp. 4-5), alleges general negligence. Under this count the court instructed the jury (R. p. 106) that the issues were: "Was the defendant guilty of negligence in the *operation of the cars* or *in allowing a defect in its instrumentalities to exist* that was the cause of the deceased's death?"

Since no objection was made or exception taken to this instruction, it became the law of the case.

S. E. Rand Transportation Co. v. *Boston & Maine R.R.*, 273 Mass. 327, 329, 332.
Dunbar v. *Ferrera Bros. Inc.*, 306 Mass. 90, 91.

(*b*) Any issue under the second count as to negligence predicated on a defect in the carrier's instrumentalities is foreclosed by the jury's verdict for the defendant on the first count, which alleges (R. p. 2) that "*by reason of a defect or insufficiency, due to the negligence of the defendant, in its car, track or roadbed, the car upon which the decedent was riding was derailed . . .*"

Papageorge v. *Boston & Maine R.R.*, 317 Mass. 235, 239.
Peterson v. *Boston & Maine R.R.*, 310 Mass. 45, 51.

In *Papageorge* v. *Boston & Maine R.R.*, 317 Mass. 235, the court said at page 239:

> "The verdict for the defendant upon the first count of the declaration which alleged a failure upon the part of the defendant to give the statutory signals required by G. L. (Ter. Ed.) c. 160, § 138, *is not consistent with any contention that can now be made that such signals were not given.*"

The case of *Romana* v. *Boston Elevated Ry.*, 226 Mass. 532, referred to in the opinion of the Circuit Court of Appeals (R. p. 121), is not in conflict with *Papageorge* v. *Boston & Maine R.R.*, 317 Mass. 235, or *Peterson* v. *Boston & Maine R.R.*, 310 Mass. 45, previously cited.

In the *Romana* case the court said at page 536:

> "1. The declaration contained two counts. The first count was for ordinary negligence; the second count was for 'wilful, wanton and reckless negligence of the defendant company, its agents or servants.' On the second day of the trial the presiding judge directed the jury to find a verdict for the defendant on the first count and to this the counsel for the plaintiff consented. The defendant then contended that the verdict in its favor upon the first count entitled it as matter of law to a verdict in its favor on the second count."

The court held that no question of *res judicata* was involved; and this ruling was correct, since there was no *judgment* involved, but merely a *verdict* of the jury on the first count.

> *Oklahoma City* v. *McMaster*, 196 U.S. 529, 533.
> *Boston Food Products Co.* v. *Wilson & Co.*, 245 Mass. 550, 558.

In the *Romana* case the jury's verdict for the defendant on the first count, which was for negligence, had no bearing whatever on the issue of wilful, wanton and reckless conduct under the second count, since the kind of tort alleged in the first count was entirely different from the kind of tort alleged in the second count.

In *Commonwealth* v. *Welansky*, 316 Mass. 383, the Supreme Judicial Court of Massachusetts—the same court that decided both the *Papageorge* and the *Romana* cases—cites the *Romana* case at page 400, and says:

> "In pleadings as well as in statutes the rule is that 'negligence and wilful and wanton conduct are so different in kind that words properly descriptive of the one commonly exclude the other.'"

The court further says at page 401:

> "If by wanton or reckless conduct bodily injury is caused to another, the person guilty of such conduct is guilty of assault and battery. . . . And since manslaughter is simply a battery that causes death, . . . if death results he is guilty of manslaughter."

It is clear, therefore, that in the *Romana* case the jury's verdict for the defendant on the first count for negligence could have no bearing whatever on the question of wilful conduct alleged in the second count.

In the case at bar there is no such distinction between the issues involved in the first and in the second counts. The first count alleges specific negligence, and the second count alleges general negligence, just as in the case of *Papageorge* v. *Boston & Maine R.R.*, 317 Mass. 235, which is controlling in the instant case, since the jury's verdict for the defendant on the first count is equivalent to a special finding of fact against the plaintiff's contention that there were defects in the car, track or roadbed, including the frog and the switch.

The same rule holds in cases of special findings of fact by the court.

> *Davis* v. *Aetna Acceptance Co.*, 293 U.S. 328, 332, and cases cited.

In the case just cited, the court said at page 332:

> "The special controls the general, just as upon the verdict of a jury."

(*c*) In the case at bar, if the direction of a verdict for the defendant on the first count be regarded as a ruling of

law, the same result is reached as if the jury's verdict be treated as a finding of fact, since no objection was made and no exception taken.

Keogh v. *South Buffalo Ry. Co.*, 233 N.Y. 31, 33.

In the case just cited the court said at page 33:

> "In his charge to the jury the trial judge without objection stated that if there was no defect or insufficiency in the cars of the defendant or in its tracks, roadbed or equipment there could be no recovery. By the use of the word 'equipment' he had reference to the details of the cars or of the tracks. Later he was asked to say and did say that there was no evidence in the case as to the condition of the cars from which the jury could find the defendant negligent. He thus eliminated any consideration of this source of complaint. There was left a possible defect in the track causing the accident."

(*d*) The plaintiff cannot question the conclusiveness of the adverse finding under the first count of the complaint in the absence of a cross-appeal.

Alexander v. *Cosden Pipe Line Co.*, 290 U.S. 484, 487.

Morley Constr. Co. v. *Maryland Casualty Co.*, 300 U.S. 185, 191.

United States v. *Ten Cases, More or Less, Bred Spred*, 49 Fed. (2) 87, 89.

(*e*) The result is that the jury's verdict on the first count (R. p. 9) and the judge's instruction to the jury (R. p. 106) eliminated under the second count all ground of complaint except possible *negligence in the operation of the*

train, which is *particular* negligence. And it is well settled that the doctrine of *res ipsa loquitur* can never be invoked to supply the place of evidence of *particular* negligence, even in passenger cases.

James v. *Boston Elevated Ry.*, 201 Mass. 263, 265.

Minihan v. *Boston Elevated Ry.*, 197 Mass. 367.

In *James* v. *Boston Elevated Ry.*, 201 Mass. 263, the court said at page 265:

> "If there are different kinds of negligence that might cause an accident, the fact that the accident happens from some unknown cause is not enough to show that it happened from some . . ." (Italics ours.)

In order to escape under the second count the effect of the jury's finding of fact against the plaintiff as to the specific negligence alleged in the first count, the plaintiff erroneously argues that the defendant is invoking the doctrine of *res judicata* (Plaintiff's Brief, pp. 2, 7, 32-33), and quotes in this connection from the opinion of the Circuit Court of Appeals the following (R. p. 121): "We refuse to consider the point made but as to its merits see *Romana* v. *Boston Elevated Ry.*, 226 Mass. 532, 536."

Neither the Circuit Court of Appeals nor the plaintiff is correct in stating that "the defendant . . . contends that the verdict in the first count is *res judicata* as to the second count" (R. p. 121). No such contention is now made or ever has been made by the defendant. In the first place, the defendant does not contend that the two counts are *identical* (Plaintiff's Brief, p. 32). What the defendant does contend is that the second count for general negligence, being broader than the first count, in-

cludes, in addition to other grounds of negligence, the specific grounds of negligence alleged in the first count. In the second place, the defendant does not contend that the doctrine of *res judicata* is applicable, since that doctrine does not rest upon *verdicts* or *findings of fact*, but upon *judgments*.

Oklahoma City v. *McMaster*, 196 U.S. 529, 533.
Romana v. *Boston Elevated Ry.*, 226 Mass. 532, 536.
Boston Food Products Co. v. *Wilson & Co.*, 243 Mass. 550, 558.

Accordingly the Circuit Court of Appeals, as well as the plaintiff, is in error in assuming that this was a point which under Rule 75(d) of the Rules of Civil Procedure should have been designated as a point to be relied on on appeal. Since the defendant is making no contention that the doctrine of *res judicata* is applicable, it was unnecessary to make any designation of this as a point to be relied on.

The defendant's argument that the jury's verdict for the defendant on the first count eliminated from consideration under the second count the particular charges of negligence alleged in the first count is merely an argument in support of the proposition that the doctrine of *res ipsa loquitur* is not applicable to the facts in this case; and that point is specifically designated as the sixth point to be relied upon in the Statement of Points to be Relied upon on Appeal (R. p. 116).

For each and all of the foregoing reasons it is respectfully submitted that the Circuit Court of Appeals was not in error in ruling (R. p. 122) that the doctrine of *res ipsa loquitur* is not applicable to the facts of this case.

IV. The plaintiff's arguments do not support her contention that the Circuit Court of Appeals was in error as specified (Plaintiff's Brief, pp. 5-6).

Point One: In discussing the first specification of error (Plaintiff's Brief, pp. 7-9, inclusive), the plaintiff contends that "the decision of the appellate court rests principally if not entirely upon the false concept that the 'thing' which caused the injury in the case at bar was *within the confines of a compound of elements,*" enumerating the elements. It is not the concept of the Circuit Court of Appeals which is false, but the concept of the plaintiff. And the confusion in this part of the plaintiff's argument arises from the fact that the discussion is based on semantics and not on legal principles.

The plaintiff argues (Plaintiff's Brief, pp. 8-9) that both by intrinsic analysis and by judicial decisions the word "*thing*" means "*inanimate objects*" and does not include *conduct* as an element. This is erroneous. The word "thing" as used in the doctrine of *res ipsa loquitur* does not mean inanimate objects as the plaintiff claims, but rather means "the occurrence" or "happening" of an accident. And the occurrence or happening of an accident may result from conduct, as well as from defective conditions of inanimate things.

In the case at bar, it was the *derailment* which was the "*thing*" causing the injury, and it was the *derailment* with its attendant circumstances that speaks for itself. See 38 Am. Jur. § 308, p. 1005. Some of the attendant circumstances include *conduct* of the decedent himself, such as "The stopping of the train to begin the switching, the giving of the signals, the throwing of the switch, the backing of the train" (R. p. 122) in response to his signals.

The case of *San Juan Light Co.* v. *Requena*, 224 U.S. 89, 98-99, does not support the reasoning of the plaintiff. In

that case, from which a quotation appears on page 8 of plaintiff's brief, reference is made to *conduct* in the words: "the defendant's want of care." Want of care is *conduct*—negligent conduct. Furthermore, the words "without fault of the injured person" refer to *conduct*.

The fact, if it be a fact, as stated by the plaintiff at page 9 of her brief, that nowhere does Wigmore in his article "refer to *conduct* as a part of the doctrine" gives no support at all to plaintiff's contention. Even if Wigmore does not use the word "*conduct*," he does speak of "negligence," which is careless *conduct*.

The Circuit Court of Appeals was therefore correct in stating that the cause of the injury was "within the confines of a compound of elements" (R. p. 122). The concept of the Circuit Court of Appeals is correct, and is supported by all the authorities. Directly in point is the case of *Texas & Pacific Coal Co.* v. *Kowsikowsiki*, 103 Tex. 173, quoted at pages 21-23 of this brief, and cited with approval in—

Bonner v. *Texas Co.*, 89 Fed. (2) 291, 294.
Davis v. *Castile*, 257 S.W. 870 (Tex.).

In *Bonner* v. *Texas Co.*, 89 Fed. (2) 291, the court said at page 294:

> "*Res ipsa loquitur* does not help, for that doctrine applies only when the instrumentalities causing injury are shown to have been wholly in the care of defendant, and *not to have been meddled with by the person injured or outsiders.*" (Italics ours.)

In this connection it should be noted that in the latter part of her brief the plaintiff seems to have abandoned the theory that the word "thing" means "instrumentality" or "inanimate objects" and does not include conduct, for on page 30 there appears the statement "The *derailment* in

the case at bar ought to be sufficient, of itself, to raise a presumption in favor of the plaintiff or to permit an inference of negligence on the part of the defendant." *"Derailment"* is not a *"thing"* within the narrow meaning of that term assigned by the plaintiff; it is rather the *occurrence* or *happening* of the accident.

Points Two and Three: A second cause of confusion in the reasoning of the plaintiff results from an erroneous conception of the meaning of the term *"control"* as applied to instrumentalities. This is discussed under points two and three of the plaintiff's brief, pages 10-28. It is summarized on page 7, first paragraph, as follows:

> "Control, as that word is used in the doctrine, does not include the use or operation of the 'instrumentality' or 'thing' by an employee who is bound to use the 'things' provided for him by his master in the performance of his duties to the master."

No authority is cited by the plaintiff in support of this unsound contention. On the contrary, all the authorities hold that if the injured party had any part in *handling, managing,* or *operating* any instrumentality involved in the accident, he had sufficient control to prevent him from invoking the doctrine of *res ipsa loquitur.*

In this connection the court said in *Texas & Pacific Coal Co.* v. *Kowsikowsiki,* 103 Tex. 173, at page 174:

> "The deceased himself had a hand in the management of the switches, and also in controlling the movements of the car, in so far as it depended on the giving of signals."

Accordingly the court held that the doctrine of *res ipsa loquitur* was not applicable.

In the same connection, in the case of *Bonner* v. *Texas Co.*, 89 Fed. (2) 291, the Circuit Court of Appeals said at page 294:

> "Res ipsa loquitur does not help, for that doctrine applies only when the instrumentalities causing the injury are shown to have been wholly in the care of defendant, *and not to have been meddled with by the person injured or outsiders.*" (Italics ours.)

For further authorities see cases cited in this brief at pages 16-19.

The plaintiff's reasoning (Plaintiff's Brief, p. 11) is erreoneous in concluding that "Both counsel for the railroad and the appellate court treated the act of throwing the switch *at the wrong time* as a matter of control." This is not so. So far as *control* is concerned, the fact that the decedent threw the switch is conclusive that he *controlled* it, regardless of whether he threw it at the wrong time or not.

Not only does the undisputed evidence show that the decedent was in *control* of the hand switch involved in the switching operation, but the ruling of the District Court to that effect (R. p. 104), without objection or exception, establishes such control as the law of the case.

S. E. Rand Transportation Co. v. *Boston & Maine R.R.*, 273 Mass. 327, 329, 332.
Dunbar v. *Ferrera Bros. Inc.*, 306 Mass. 90, 91.
Prondecka v. *Turners Falls Power & Elec. Co.*, 238 Mass. 239, 241.
Arabia v. *John Hancock Mut. Life Ins. Co.*, 301 Mass. 397, 401.
Santa Maria v. *Trotto*, 297 Mass. 442, 446-447.

It follows that both on the facts and on the law of the case the Circuit Court of Appeals was not in error in making the following ruling (R. p. 122): "In this compound of elements the railroad corporation was not in *exclusive* control. Jesionowski was in control of important elements."

Moreover, it was not necessary for the defendant to request the trial court to rule on each and every detail of control, as contended by the plaintiff in her brief, at page 4. Some of these details have been characterized by the plaintiff in the following language (Plaintiff's Brief, p. 4): "These extraneous objects of control were *injected into the case* by the appellate court. In so doing the court clearly went outside of the instructions requested, denied, and excepted to." This argument is unsound, since these were all proper matters to be considered by the Circuit Court of Appeals in passing upon the error of the District Court both in denying the defendant's motion for a directed verdict on the second count and in denying the defendant's sixth request for instructions, which is as follows: "6. The doctrine of res ipsa loquitur is not applicable to the facts in this case."

There is nothing in the case of *Sweeting* v. *Penn. R. Co.*, 142 Fed. (2) 611, cited and discussed at pages 12-14 of plaintiff's brief, that supports the plaintiff's reasoning. In that case the court very properly held that, if the decedent was in the cab of the locomotive when he received the fatal electric shock, the doctrine of *res ipsa loquitur* would apply, since in that event the decedent would have had no *control* of the electric current which caused his death; but if the accident happened on the top or outside of the locomotive, then the doctrine would not apply, since in such case the accident *might have happened* as the result of the decedent's own conduct. The only question of fact

which the jury had to decide upon conflicting evidence was whether or not the decedent was inside the cab at the time he received the electric shock.

The plaintiff quotes from the *Sweeting* case on page 13 of her brief as follows:

> "Sweeting must be presumed to have been engaged in the performance of his duties and exercising due care for his own safety."

That is so in all cases in which there is no eye-witness to the conduct of a decedent. In the case at bar, however, there is undisputed evidence by the plaintiff's own witness Whitney as to the conduct of the decedent which may have caused the derailment.

On page 14 of her brief the plaintiff contends that the trial judge correctly charged the jury as to the application of the doctrine of *res ipsa loquitur*. The charge of the judge of the District Court as to this point is to be found in the record at pages 103-104. In its opinion (R. pp. 121-122) the Circuit Court of Appeals said:

> "It is the theory of appellant that since the operation of the switch, which was to direct the four cars from the main line onto the siding, was in the control of Jesionowski, and that since the instrumentality, which was involved in the damaging accident, was not under the exclusive control of appellant, the doctrine of *res ipsa loquitur* does not apply. Upon this question the trial court was most painstaking to explain that the jury should first consider whether or not the decedent was guilty of negligence, and that should they find him guiltless or at least guiltless as to any negligence contributing to the accident, the jury should then apply the doctrine of *res ipsa loquitur*. *This was error.*

The possible causal actions leading up to the fatal accident cannot be so separated. . . .

"The thing that caused the injury could have been Jesionowski's fault, or it could have been the railroad corporation's fault. It was the jury's duty to determine the cause of the accident, and since it must make that determination out of a set of facts wherein either one or both of the actors may have been at fault, it must do so without the aid of the doctrine of *res ipsa loquitur.*"

The quotation from Prosser on Torts (Plaintiff's Brief, p. 15) does not support the plaintiff's contention. In its opinion (R. pp. 122-123) the Circuit Court of Appeals quotes from Prosser on Torts, p. 295, and then says: "Thus an essential element of the principle of *res ipsa loquitur* is that the defendant have *exclusive* control of the thing causing the injury. Such essential element is not clear in this case."

It follows that the plaintiff has failed to sustain her burden of proof. See cases cited at pages 28-31 of this brief.

The quotations appearing in the plaintiff's brief at pages 15-17 are misleading. The distinction between "actual physical control" and the "right of control" is of no consequence in cases between employers and strangers, since in such cases physical or user control by the employee is legal control by the employer. But in cases between an an employee and his employer, *user control* or operation of the instrumentality is such control as will defeat the application of the doctrine of *res ipsa loquitur.*

Only one of the cases, *Cantley* v. *Missouri-Kansas-Texas R. Co.*, 353 Mo. 605, cited by the plaintiff at page 15, is an

employee case. In the *Cantley* case there was an issue of fact as to whether or not the speed of the engine at a curve caused the derailment, the plaintiff having had nothing to do with the *operation* of the engine.

In *Van Horn* v. *Pacific Refining & Roofing Co.*, 27 Cal. App. 105, 109, the plaintiff, who was not an employee of the defendant, was injured by reason of the explosion of a steampipe cap *which was in the exclusive control of the defendant.*

In *Doughnut Machine Corp.* v. *Bibbey*, 65 Fed. (2) 635, the lessee of a doughnut machine was injured by reason of a defective condition of the machine. The court did not permit the application of the doctrine of *res ipsa loquitur*, for the reason that there was direct evidence of a defective condition of the machine which caused the injury.

The case of *Osgood* v. *Los Angeles Traction Co.*, 137 Cal. 280, is a *passenger* case in which no such question of *control* could have been involved as is involved in the case at bar.

Both of the English cases cited (Petitioner's Brief, p. 17) involved innocent third parties and not employees who had a part in operating instrumentalities causing the injuries.

In this connection it must also be remembered that the case of *San Juan Light Co.* v. *Requena*, 224 U.S. 89, referred to on page 17 and elsewhere in plaintiff's brief, was a case in which the plaintiff was an innocent third party, and not an employee who had something to do with the operation of the instrumentality involved in the accident.

Quoting from the *San Juan* case the words "without fault of the injured person," the plaintiff proceeds to argue (p. 18) as follows: "It cannot be doubted that Jesionowski's alleged negligence was a question of fact for the jury which the defendant was bound to prove by a fair prepon-

derance of the evidence." This is erroneous. The only burden which the defendant had with regard to Jesionowski's negligence was the burden of proving contributory negligence, which is not now an issue. It follows that the cases cited by the plaintiff on page 18 are not in point, since they deal with contributory negligence.

Again, on page 28 of her brief the plaintiff says: "In the case at bar the defendant undertook to prove that the deceased's own act was the sole cause of his death. The burden was on the defendant to persuade the jury, by a fair preponderance of the evidence, that this was true." No such burden rested on the defendant.

It is true that the defendant's answer (R. pp. 5-6) contains the following: "And further answering the second count of the complaint, the defendant says that the plaintiff's intestate was guilty of negligence which was the sole proximate cause of his injuries and death." But this is a wholly unnecessary and immaterial allegation. It is only another way of saying that there was no negligence on the part of the defendant, which is properly raised by the general issue. *Palum* v. *Lehigh Valley R. Co.*, 65 F. Supp 1010. The defendant's general issue cannot thus be converted into an affirmative defense putting the burden of proof on the defendant.

Sweeney v. *Erving*, 228 U.S. 233, 240.
Byerly v. *Light & Power Co.*, 130 Mo. App. 593.
Warner v. *Railroad*, 178 Mo. 125, 133.
Rogers v. *Packing Co.*, 180 Mo. App. 227, 236.

The only issue before the court being negligence of the defendant, the burden is on the plaintiff to show such negligence. Accordingly the Circuit Court of Appeals ruled (R. p. 121) as follows: "By the answer the plaintiff was put upon her proof as to the defendant's alleged negli-

gence." This ruling was correct. The burden of proof is always on the employee to show negligence of the employer.

Pennsylvania R. Co. v. *Chamberlain,* 288 U.S. 333, 343.

Baltimore & Ohio R. Co. v. *Berry,* 286 U.S. 272, 276.

St. Louis &c. Ry. v. *Mills,* 271 U.S. 344, 347.

Texas & Pacific Coal Co. v. *Kowsikowsiki,* 103 Tex. 173, 175.

At the bottom of page 19 of her brief the plaintiff criticizes the following statement of the Circuit Court of Appeals (R. p. 122): "The thing that caused the injury could have been Jesionowski's fault," and says that this is not the true test. It is respectfully submitted that this is the true test as established by all the authorities. This point has been fully argued in this brief at pages 20-33.

The plaintiff, however, contends that "the test is whether or not the presumption of due care, and the evidence in the case, sufficed, as a matter of law, to make a jury issue." This argument is unsound for two reasons. In the first place, the presumption of due care on the part of a deceased employee is available only where there is no direct evidence as to what the decedent was doing at the time of the accident. In the case at bar the evidence (R. pp. 11-13, 22-23) shows what the decedent was doing.

Bagnell v. *Boston Elevated Ry.,* 247 Mass. 235, 238.

Brown v. *Boston & Maine R.R.,* 302 Mass. 90, 92.

In the second place, this presumption cannot be invoked to prove negligence of a defendant in a *res ipsa loquitur* case,

where, as in the case at bar, the inference of negligence of the defendant is not the only inference that may reasonably be drawn. The defendant's *negligence* cannot rest upon presumptions. It is a fact to be proved by the plaintiff.

> *Looney* v. *Metropolitan R. Co.*, 200 U.S. 480, 488.
> *Southern Ry. Co.* v. *Stewart*, 115 Fed. (2) 317, 322.
> *Mikolajczyk* v. *Allcutt*, 102 Fed. (2) 82, 84.
> *Clark* v. *Detroit & M. R. Co.*, 197 Mich. 489.

The rule enunciated in all the cases is well stated in *Looney* v. *Metropolitan R. Co.*, 200 U.S. 480, at page 488, as follows:

> "But the negligence of a defendant cannot be inferred from a presumption of care on the part of the person killed. A presumption in the performance of duty attends the defendant as well as the person killed. It must be overcome by direct evidence. One presumption cannot be built upon another."

None of the cases cited by the plaintiff on page 20 of her brief involves the doctrine of *res ipsa loquitur*, except the last case cited, *Sweeting* v. *Penn. R. Co.*, 142 Fed. (2) 611, 614, which has been distinguished by the defendant on pages 44-45 of this brief.

The case of *Tennant* v. *Peoria & Pekin Union Ry. Co.*, 321 U.S. 29, does not support the reasoning of the plaintiff. In the first place, in the cited case there was direct evidence of a violation of the railroad's own rule to ring a bell before starting a locomotive, and hence evidence of negligence; and in the second place, there was no evidence to show what the decedent was doing at the time of his death. Accordingly, it was properly held that he was pre-

sumed to have been engaged in the performance of his duties and that he exercised due care for his own safety at the time of his death. In its opinion in the *Tennant* case this court cites with approval the case of *Looney* v. *Metropolitan R. Co.*, 200 U.S. 480, 488; and that case is an authority directly against the petitioner's contention.

In the case at bar there was direct evidence as to the behavior of the decedent. This is conceded by the plaintiff on page 20 of her brief in the statement that Whitney was the only witness who testified as to the behavior of the deceased.

The plaintiff's statement on page 21 of her brief that the decedent mounted the stirrup *at the rear end* of the fourth car on the north or engineer's side, and there rode forward with the cut until he was opposite the switch, is unsupported by any evidence in the case. There is no evidence, direct or circumstantial, as to which stirrup or ladder the decedent used in getting on or getting off the car. He could properly have mounted the ladder on either end of the car and have been in the exercise of due care. Moreover, there is no evidence as to what car he got on after throwing the switch. It may have been the rear end of the third car, since his body was found under the third car after the derailment (R. p. 15).

The plaintiff argues that it would be irrational to say "that the fourth car stopped before it reached the switch points and that Jesionowski then, with the cars standing motionless, got off the *rear stirrup* and walked *diagonally forward* to the switch, passing the rear half of the fourth car." The defendant does not contend that the fourth car stopped before it reached the switch points; its contention is that the decedent stopped the train in such a way

that the fourth car straddled the switch points. Furthermore, there is no evidence that the decedent got off the fourth car by the *rear stirrup*. Moreover, the evidence quoted on page 21 of the petitioner's brief shows that the decedent walked "*at right angles*" from the car to the switch. And this evidence is just as consistent with the theory that he walked at right angles from the front of the car as with the theory that he walked at right angles after getting off the fourth car by the rear ladder. This evidence proves nothing as to the ladder he used. In the complete absence of evidence, no conjecture can be indulged as to whether he got on the third car or the fourth car, or if on the fourth car, whether he got on by the front ladder or by the rear ladder.

The alternative hypothesis or speculation set out by the plaintiff at the top of page 22 of her brief is without foundation in fact. There is no evidence whatever that the derailment occurred "*at the frog,* 75½ feet to the east of the switch points." The undisputed evidence (R. pp. 66, 77, 94) shows that the derailment occurred *before the frog was reached.* And if the jury disbelieved this evidence, that would not warrant a finding that the derailment happened because of the frog, since it is well-settled law that disbelief of testimony is not the equivalent of proof of facts contrary to that testimony.

Boice-Perrine Co. v. *Kelley,* 243 Mass. 327, 330.
McDonough v. *Vozzela,* 247 Mass. 552, 558.
Tanona v. *N.Y., N.H. & H. R.R.,* 301 Mass. 589, 592.

The plaintiff attempts to find support for this argument by again referring to the presumption of due care. As previously argued in this brief, the presumption of due

care of the decedent cannot be used as a basis for a presumption of negligence on the part of the defendant.

Looney v. *Metropolitan R. Co.*, 200 U.S. 480, 488.

It is unnecessary to discuss the plaintiff's argument in her brief, pages 22 to 28, that "the only evidence to support the defendant's plea that the deceased's death was solely caused by his own act consisted of testimony as to certain distances and the length of the engine and cut of four cars." The allegation in the defendant's answer (R. pp. 3-4) that the decedent's own negligence was the sole proximate cause of his injuries and death, as previously argued, was wholly unnecessary and immaterial. The burden is on the plaintiff to prove the defendant's negligence. There is no burden on the defendant to prove that the sole cause of the derailment was the conduct of the decedent. This point has been argued previously in this brief at pages 47-49.

Point Four: The plaintiff begins discussion of point four by referring again to the case of *San Juan Light Co.* v. *Requena*, 224 U.S. 89. It should be observed in connection with this case, as previously argued, that this was not a case involving an employee, but an innocent third party who had no part in the management, control or operation of the instrumentality involved. And while the definition of the doctrine is correctly given in that case, it is important to consider its application to employee cases where the injured employee had a part in handling the instrumentalities involved, as was done in the case of *Texas & Pacific Coal Co.* v. *Kowsikowsiki*, 103 Tex. 173, 174-175.

As to the first requirement stated in the definition given in the *San Juan* case, namely, that the plaintiff be without fault, the plaintiff again erroneously argues that "*the*

burden was on the respondent to persuade the jury, by a fair preponderance of the evidence," that the decedent's own act was the cause of his death. The fallacy of this argument has been discussed at length on pages 47-49 of this brief.

While it is true that there is a presumption of due care on the part of a deceased employee, in the absence of evidence as to what he was doing, there is an equal presumption of due care on the part of the employer. That is why an injured employee always has the burden of proving by affirmative evidence that the employer was negligent. What the plaintiff seeks to do in this case is to eliminate the requirement that the employee be without fault by invoking the presumption of due care on the part of the employee. The effect of such a theory would be to nullify completely the condition precedent that the injured employee must be without fault. In the case at bar, therefore, the Circuit Court of Appeals applied the proper test in its ruling (R. p. 122): "The thing that caused the injury could have been Jesionowski's fault, or it could have been the railroad corporation's fault. It was the jury's duty to determine the cause of the accident, and since it must make that determination out of a set of facts wherein either one or both of the actors may have been at fault, it must do so without the aid of the doctrine of *res ipsa loquitur.*" This question has been treated at greater length with citation of authorities earlier in this brief at pages 20-33.

As to the second and third requirements of the definition concerning *control,* nothing need be added to what has already been said at pages 16-20 of this brief.

On page 29 of plaintiff's brief reference is made to "instructions of the trial judge which were not excepted to." Reference is also made to this point on pages 2 and

5. On page 5 the plaintiff says: "So far as the *doctrine* is concerned, it is to be noted that neither party excepted to the judge's charge, which consequently became the law of the case." This argument is unsound. While it is true that no exception was taken to the charge, the defendant had saved its rights so that no exception to the charge was necessary. The defendant did take an exception (R. p. 97) to the trial court's denial of its motion for a directed verdict on the second count (R. pp. 7-8). The question of *res ipsa loquitur* is implicit in the first, second, third, fourth and sixth grounds in support of the motion, and especially in the fourth ground (R. p. 8): "4. The *evidence* does not warrant a finding that the derailment was due to any negligence of the defendant." Since the doctrine of *res ipsa loquitur* is merely a rule of *evidence*, the question of the applicability of the doctrine was sufficiently raised by the fourth and other grounds alleged in support of the motion for a directed verdict. Hence it is not true, as contended by the plaintiff on pages 3-4 of her brief, that not one of the grounds for the motion raises the issue of the applicability of the doctrine of *res ipsa loquitur*.

Moreover, the applicability of the doctrine was raised by the defendant's sixth request for instructions (R. p. 110), which is as follows: "6. The doctrine of *res ipsa loquitur* is not applicable to the facts in this case." The court denied this request, subject to the defendant's exception (R. pp. 109-110), and gave the jury instructions inconsistent with this request. No exception to the charge was necessary, since the defendant's rights were properly saved by its exception to the court's refusal to grant its request.

Conn. Mutual Life Ins. Co. v. *Hillmon*, 188 U.S. 208, 212-213.

Peirson v. *Boston Elevated Ry.*, 191 Mass. 223, 234.

Ginzler v. *Birmingham*, 6 Ala. App. 666.

In *Conn. Mutual Life Ins. Co.* v. *Hillmon*, 188 U.S. 208, the court said at page 213:

> "It is insisted in behalf of the plaintiff that, as no exception was taken to this part of the charge, its propriety cannot be questioned at this time; but as an exception was properly taken to the refusal of the court to charge . . . , we think there was sufficient to raise the point . . . Having excepted to the refusal to give a certain instruction, it was not necessary to repeat such exception when the contrary of such request was given in the general charge. As defendant had raised the point in one form, it was not necessary to raise it in another."

In *Peirson* v. *Boston Elevated Ry.*, 191 Mass. 223, the court said at page 234:

> "Nor is it any answer to the respondent's complaint to say that no exception was taken to the manner in which the charge to the jury dealt with this question. The evidence had been admitted subject to the respondent's exception. It had preserved its rights, and was not called upon to ask for any further ruling or to save any further exception upon this subject."

On page 30 of her brief the plaintiff cites the case of *Cochrane* v. *Pittsburgh & L.E.R. Co.*, 31 Fed. (2) 769, in an attempt to place an injured employee in as favorable position as an injured passenger, if not a more favorable position, and quotes from page 773 of that case:

> "The Federal Employers' Liability Act supplemented by the Safety Appliance Act has entirely changed the situation. Now an employee of an interstate carrier . . . is entitled to recover as broadly as an interstate passenger. The differences are very slight, and

such as do exist are probably in favor of the employee."

Even if there is any merit in that dictum, it has no application to the case at bar, since in the case at bar the injured employee had something to do with the operation of the instrumentalities involved in the derailment, and in the *Cochrane* case the court in its opinion stresses the importance in a derailment case of the absence of any control by the employee in the operation in which he is injured. In the *Cochrane* case the employee was injured as the result of an unexplained derailment which could not have been due to any conduct on his part, since the injured employee had no part whatsoever in the handling, direction, control, or operation of the train or other instrumentalities involved in the derailment, either by giving signals, throwing a switch or otherwise.

The other two cases cited on page 30 of the plaintiff's brief require little comment.

The case of *McNamara* v. *Boston & Maine R.R.*, 202 Mass. 491, merely holds that control by an employee is control by the employer *so far as innocent third parties are concerned*. It was not an employee of the defendant who was injured.

In *Leet* v. *Union Pacific R. Co.*, 144 P. (2) 64, the injured employees had no part whatever in the direction, control, operation, or handling of the instrumentalities involved in the derailment. Moreover, there was direct evidence of negligence on the part of the defendant *without the application of the doctrine*, and therefore the defendant was not prejudiced by instructions concerning the doctrine which the court gave.

At the bottom of page 30 the plaintiff argues: "If the derailment occurred *at the switch*, is it not remarkable that this happened despite the facts that the switch was thrown

in a proper manner and at the right time?" In the first place, there is no evidence that "the switch was thrown at the right time," and in the second place, there is no evidence that the derailment happened "at the switch." The evidence is that the derailment occurred at a point 69 feet *east of the switch* (R. pp. 76, 77, 83, 86), which clearly indicates that the derailment occurred as the result of the decedent's throwing the switch while the last car straddled the switch points. In this connection it should also be remembered that it was not the lead wheels of the backing car which were derailed, but the rear wheels (R. pp. 26, 50, 63-64, 76), and this fact constitutes further proof that the wheels, which would be the lead wheels in the backing movement, had not reached the switch. If, as the petitioner contends, the switch was properly thrown after all the wheels of the four cars had gone beyond the switch points, and if the decedent then set the switch for the movement onto the side track, as it was found to be set after the derailment (R. p. 17), and if, as the evidence shows (R. pp. 26, 50, 63-64, 76), the lead wheels went down the main track and were never derailed, the following wheels having gone down the side track and having become derailed, in that case the accident could not have happened unless the switch points, which could be operated only by hand (R. pp. 17, 66), first jumped to let the lead wheels go down the main track and then jumped back to let the following wheels go down the side track. Such a performance by a hand switch, without interference of any kind—of which there is no evidence—is impossible; and such a theory of the accident must be rejected.

The plaintiff next argues, at the bottom of page 30: "Or, if the derailment occurred at or near the frog, is it not remarkable that there were planks between the rails near the frog?" The fair interpretation of the evidence

in this respect (R. pp. 13, 18, 23, 26, 27, 28) is not that there were *planks* between the rails, but *splinters* of planks which *came up from under the cars* (R. p. 28) between the rails, which indicated to the engineer that there was a derailment and caused him to stop (R. p. 13). However that may be, the undisputed evidence shows that the derailment occurred at a point 6 to 8 feet west of the frog (R. pp. 66, 77, 83, 94), that is, before the wheels of the lead car, which went down the siding in response to the switching movement, had reached the frog. The fact that there were marks of wheel flanges on top of the rails (R. p. 77) 6 or 7 feet west of the frog (R. p. 66) indicates clearly that the wheels were derailed before the frog was reached. The testimony concerning the frog is immaterial for the reason that there is no evidence that the frog was involved in the derailment, since the undisputed evidence clearly shows that the derailment occurred before the frog was reached.

Finally it is said that there is no evidence to show that the front wheels of the fourth car took the main line at the switch. The answer is that there is no evidence to show that the lead wheels in the backing movement ever left the main track, for the reason that there is no evidence that those wheels ever reached the switch points.

The frustration of plaintiff's counsel, mentioned on page 32 of her brief, results from the failure of counsel to understand that the condition precedent to the applicability of the doctrine of *res ipsa loquitur*, namely, that the employee be without fault, is not fulfilled by invoking a presumption of due care on the part of the injured employee, since there is an equal presumption that the employer was in the exercise of due care, which leaves the scales on this point in equal balance.

Looney v. *Metropolitan R. Co.*, 200 U.S. 480, 488.

The plaintiff argues that the ruling of the Circuit Court of Appeals contravenes the doctrine as stated in the *Requena* case. On the contrary, the plaintiff's contention contravenes the doctrine for the reason that it is well settled in employee cases that the doctrine does not apply if the injury *might* have resulted from the conduct of the injured employee. This point has been argued fully in this brief at pages 20-33.

Point Five: The plaintiff's argument under Point Five, pages 32-33 of her brief, is unsound. The plaintiff seems to misunderstand the effect of the verdict for the defendant on the first count. The defendant does not contend that the two counts are identical. Notwithstanding the contention of the plaintiff and the statement of the Circuit Court of Appeals (R. p. 121), the doctrine of *res judicata* is not involved. This point has been fully discussed in this brief at pages 33-39.

Conclusion.

Upon the facts and upon well-settled principles of law it is respectfully submitted that the Circuit Court of Appeals was not in error in ruling that the doctrine of *res ipsa loquitur* is not applicable to the facts of this case.

Wherefore the respondent prays that the judgment of the Circuit Court of Appeals be affirmed.

FRANCIS P. GARLAND,
Attorney for the Respondent.

Of Counsel:
HURLBURT, JONES, HALL & BICKFORD.

SUPREME COURT OF THE UNITED STATES

No. 88.—October Term, 1946.

Helene A. Jesionowski, Administratrix, Petitioner, v. Boston & Maine Railroad.	On Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

[January 13, 1947.]

Mr. Justice Black delivered the opinion of the Court.

Petitioner brought this action for damages in the Federal District Court under the Federal Employers Liability Act, 35 Stat. 65, 53 Stat. 1404, 45 U. S. C. § 51 *et seq*, for causing the death of her intestate. Count I alleged that "By reason of a defect or insufficiency, due to the negligence of the defendant, in its car, track, or roadbed, the car upon which the plaintiff decedent was riding was derailed . . .," causing the decedent to be thrown from the car and killed. Count II, without specifying any particular acts of negligence, charged generally that the derailment and decedent's death were the "result of the negligence of the defendant." After the evidence was in, the Court, at the request of the respondent, directed the jury to return a verdict for the respondent on the first count. Respondent's motion for directed verdict, on the second count on the ground that the evidence failed to justify a finding of negligence, and that it showed that deceased was killed as the sole result of his own negligence, was overruled. The jury rendered a verdict for petitioner and judgment was entered on it. The Circuit Court of Appeals reversed and remanded to the District Court with directions to render judgment for the respondent. 154 F. 2d 703.

The trial court charged the jury that the burden was upon petitioner to prove by a fair preponderance of the evidence that the deceased's death was caused by respondent's negligence. It invoked the trial rule under which

negligence may be inferred from unusual happenings growing out of conditions under a defendant's control. Referring to this rule under the name of *res ipsa loquitur*, the court charged: "Of course if the deceased's negligence was the sole cause of the accident the plaintiff here cannot recover. And since there can be no application of the doctrine of *res ipsa loquitur* if other causes than the negligence of the defendant, its agents or servants, might have produced the accident, the plaintiff is bound, she has the burden, to exclude the operation of such causes by a fair preponderance of the evidence before the rule can be applied. This is so because if there are other causes than the negligence of the defendant that might have caused the accident, the defendant cannot be said to be in exclusive control—one of the prerequisites to the application of the rule here invoked." The Circuit Court of Appeals reversed because it thought that the jury should not be permitted to draw an inference of defendant's negligence from an extraordinary accident growing out of a general set of circumstances which included activities of the injured person, even though a jury, under proper instructions, could find from the evidence that the injured person's activities did not cause the injury. The Circuit Court's limitation of the jury's province by this interpretation of a doctrine of *res ipsa loquitur* raised a question of importance in the trial of cases arising under federal law. We granted certiorari to consider this question. — U. S. —.

The testimony, so far as relevant, to point the issues may be briefly summarized. Four railroad cars were being pushed backward and eastward by an engine in order to put them on a siding north of the main track. It was the duty of deceased, a brakeman, to throw the switch before the first car reached it in order that the four cars would take the siding. There was evidence that he threw the switch and gave a signal to the engineer to back the cars.

Respondent's evidence was sufficient to authorize, but not to compel, the jury to find that the deceased negligently threw the switch while the lead car in the backward movement straddled the switch with one set of the car wheels on one side of the switch and one on the other. If true, this could mean that the wheels east of the switch would move down the main line and the others would enter the siding when the switch was thrown and the backward movement took place, thus probably causing derailment. If the jury had believed respondent's evidence that this last car was astride the switch when it was thrown, it would have been authorized, under the court's charge, to find for the respondent. But about 75 feet east of this switch, at a point where the south rail of the siding track intersected the north rail of the main track, there was a frog. There was testimony that this frog operated with a spring mechanism, and that if the spring failed to work when the wheels passed over it, the cars might be derailed. Some other evidence tended to show that, at the time the derailment occurred, splinters and planks were thrown into the air near the frog. Other evidence tended to show that planks and splinters were found on the track. Some testimony showed that they were close to the switch, and some that they were close to the frog. There was evidence that the frog and switch had been in good condition before the derailment and after the derailment. The cars had been operated and the tracks had been used previously, so far as the evidence showed, without any similar mishap.

In *San Juan Light Co.* v. *Requena*, 224 U. S. 89, 98–99, this Court said: "when a thing which causes injury, without fault of the injured person, is shown to be under the exclusive control of the defendant, and the injury is such as in the ordinary course of things does not occur if the one having such control uses proper care, it affords reasonable evidence, in the absence of an explanation, that

the injury arose from the defendant's want of care." Both prior to and after that case was decided, this Court has acted upon this rule in varying types of cases. *Transportation Co.* v. *Downer*, 11 Wall. 129; *Inland & Seaboard Coasting Co.* v. *Tolson*, 139 U. S. 551, 555; *Gleeson* v. *Virginia M. R. R.*, 140 U. S. 435; *Sweeney* v. *Erving*, 228 U. S. 233, 240. See also *Southern Ry.* v. *Bennett*, 233 U. S. 80; *Foltis* v. *City of New York*, 287 N. Y. 108, and cases collected, 153 A. L. R. 1134. The Circuit Court of Appeals thought, however, that the rule was improperly applied in this case because the railroad instrumentalities here were not under the "exclusive control" of the railroad; that "The thing that caused the injury could have been Jesionowski's fault, or it could have been the railroad corporation's fault." 154 F. 2d 703, 705.

The Court's reasoning was this: Petitioner was not entitled to have her case submitted to the jury except under the rule of *res ipsa loquitur*. That rule has rigidly defined prerequisites, one of which is that to apply it, the defendant must have exclusive control of all the things used in an operation which might probably have caused injury. Here the railroad did not have exclusive control of all probable causative factors since deceased had some immediate control over switching and signaling. "Exclusive control" of all probable causative factors, the court reasoned, means that *res ipsa loquitur* cannot be applied even though those non-exclusively controlled factors are clearly shown to have had no causal connection with the accident.

We cannot agree. *Res ipsa loquitur*, thus applied, would bar juries from drawing an inference of negligence on account of unusual accidents in all operations where the injured person had himself participated in the operations, even though it was proved that his operations of the things under his control did not cause the accident. This viewpoint unduly restricts the power of juries to decide questions of fact, and in this case the jury's

right to draw inferences from evidence and the sufficiency of that evidence to support a verdict are federal questions. A conceptualistic interpretation of *res ipsa loquitur* has never been used by this Court to reduce the jury's power to draw inferences from facts. Such an interpretation unduly narrows the doctrine as this Court has applied it.

This Court said, in *Sweeney* v. *Erving*, 228 U. S. 233, 240, a decision which cut through the mass of verbiage built up around the doctrine of *res ipsa loquitur*, that "*res ipsa loquitur* means that the facts of the occurrence warrant the inference of negligence, not that they compel such an inference; that they furnish circumstantial evidence of negligence where direct evidence of it may be lacking, but it is evidence to be weighed, not necessarily to be accepted as sufficient; that they call for explanation or rebuttal, not necessarily that they require it; that they make a case to be decided by the jury, not that they forestall the verdict." Thus, the question here really is not whether the application of the rule relied on fits squarely into some judicial definition, rigidly construed, but whether the circumstances were such as to justify a finding that this derailment was a result of the defendant's negligence. We hold that they were.

Derailments are extraordinary, not usual, happenings. When they do occur, a jury may fairly find that they occurred as a result of negligence. It is true that the jury might have found here that this accident happened as a result of the negligence of the deceased; but although the respondent offered evidence to establish this fact, it "did not satisfy the jury." *Southern Ry.* v. *Bennett*, *supra* at 86. With the deceased freed from any negligent conduct in connection with the switch or the signaling, we have left an accident, ordinarily the result of negligence, which may be attributed only to the lack of care of the railroad, the only other agency involved. Once a jury, having been appropriately instructed, finds that the employee's activities did not cause the derailment, the de-

fendant remains as the exclusive controller of all the factors which may have caused the accident. It would run counter to common everyday experience to say that, after a finding by the jury that the throwing of the switch and the signaling did not contribute to the derailment, the jury was without authority to infer that either the negligent operation of the train or the negligent maintainance of the instrumentalities other than the switch was the cause of the derailment. It was uncontroverted that the railroad had exclusive control of both. We think that the facts support the jury's findings both that the deceased's conduct did not cause the accident and that the railroad's negligence did.

Respondent also urges here, as it did in the Circuit Court of Appeals, that because the trial judge directed a verdict for it on the first count of the complaint, which charged a defect in the car, track or roadbed, the court was not justified in submitting to the jury the question of a defect in these respects under the second count. The Circuit Court held that this question was not properly raised before it because respondent had failed on appeal to make "a concise statement" of the point as required by Rule 75 (d) of the Rules of Civil Procedure. Respondent argues that the question was properly raised, though not specifically, by its general point that "the doctrine of *res ipsa loquitur* is not applicable to the facts of this case." We cannot hold that the Circuit Court erred when it refused to consider the question because of respondent's failure to comply with Rule 75 (d).

Reversed.

MR. JUSTICE REED, MR. JUSTICE JACKSON and MR. JUSTICE BURTON would affirm on the grounds stated in the opinion of the Circuit Court of Appeals for the First Circuit.